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CASES
DETERMINED BY THE
CHANCERY DIVISION
AND IN
LUNACY
AND ON APPEAL THEREFROM IN THE
COURT OF APPEAL.

In re GASKELL AND WALTERS' CONTRACT.

[1905 G. 2288.]

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April 4, 5, 11.

Felony—Convict—Administrator—Estate Tail—Power to disentail—Forfeiture Act, 1870 (33 & 34 Vict. c. 23), ss. 8, 10, 12—Alienation—Disposition of Lands entailed—Actual Tenant in Tail—Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), ss. 1, 15, 38, 40.

The Forfeiture Act, 1870, provides that all the real and personal property of a convict shall vest in the administrator appointed under the Act "for all the estate and interest of such convict therein," and that the administrator shall have "absolute power" to sell, convey and transfer any part of such property: by s. 8 the convict, while subject to the operation of the Act, is to be incapable of "alienating" any property:—

Held (affirming the decision of Kekewich J., [1906] 1 Ch. 440), that the administrator had no power to bar the estate tail of a convict and convey the fee to a purchaser.

Held, also, that a deed by which the convict simply granted the property to a grantee and his heirs to the use of himself, his heirs and assigns, was not an "alienation" within s. 8 of the Forfeiture Act, and consequently that the convict himself could bar his estate tail and thus enable the administrator to sell the fee.

APPEAL from a decision of Kekewich J. (1)

The facts are fully stated in the Court below, and the following summary is thought sufficient to make the arguments and judgment intelligible.

In June, 1905, F. H. Gaskell was appointed under the

(1) [1906] 1 Ch. 440.

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Forfeiture Act, 1870, administrator of the estate of a tenant in tail in possession who was undergoing a sentence of penal servitude for felony.

In July, 1905, Gaskell, by deed duly enrolled, purported to disentail his (Gaskell's) estate tail in the property.

In November, 1905, Gaskell agreed to sell the fee simple in the property to W. Walters for 1200*l.*

The purchaser objected to the title on the ground that the Forfeiture Act, 1870, conferred no power on the administrator to bar the entail of the convict, and also that the disentailing deed was wrong in form, since the estate to be barred was the estate of the convict, and not that of the administrator.

Kekewich J. was of opinion that the administrator had no power to convey the fee simple of property of which the convict was seised for an estate tail, and upheld the purchaser's objection on that ground.

The vendor appealed.

Buckmaster, K.C., and *S. R. Earle*, for the appellant. Before the Forfeiture Act, 1870, if a person was convicted of felony his chattels were forfeited absolutely, but if he were seised of an estate tail, the forfeiture would not have affected the rights of his issue; if a person were convicted of treason, then under 26 Hen. 8, c. 13, his estate tail was forfeited absolutely, and his issue were barred also. The old law on this subject is summarized in *Viner's Abridgment*, 2nd ed. vol. xiii., Forfeiture (C), p. 438, and (K), p. 446. The object of the Forfeiture Act, 1870, is "to abolish forfeitures for treason and felony," and for this purpose any difference between the consequences of treason and felony ought to be disregarded. The wording of s. 10 is wide enough to include a power to the administrator to bar this estate tail. As was said in *Carr v. Anderson* (1), "wider language it is difficult to conceive." The Act was intended to enable the administrator to deal with all the property of the convict in the same manner as the convict himself could have done prior to conviction, and so to make all his property available for the payment of his debts or the support of his

(1) [1903] 1 Ch. 90, 94.

family: by s. 10 the property is to vest in the administrator "for all the estate and interest" of the convict therein.

[ROMER L.J. If a tenant in tail before the Fines and Recoveries Act contracted to sell the fee simple and there was no fine or common recovery, what estate did the purchaser get?]

He would only get an estate descendible during the life of the tenant in tail: *Took v. Glascock*. (1) It may be that what is vested in the administrator is an estate in fee determinable by the entry of the issue, but the "estate and interest" of a tenant in tail includes the right of barring the entail, as an incident to that kind of estate; this is a right or interest and not a power. The right to convert an estate tail into a fee simple is a valuable right of property which can be the subject of a contract; the nature and extent of the words "estate and interest" is discussed in *Drew v. Earl of Norbury* (2), *Grant v. Ellis* (3), *Howitt v. Earl of Harrington* (4), and *Dering v. Kynaston*. (5) The administrator therefore has power to bar this estate tail; if he has no power then the power is suspended during sentence, because by s. 8 the convict is expressly disabled from alienating his property. Sect. 15 of the Fines and Recoveries Act, 1833, does not affect the construction of the Forfeiture Act, and the definitions of "estate tail" and "tenant in tail" cover the case of a trustee disentailing the estate of a bankrupt under the powers of the Bankruptcy Act, 1883, and they would equally meet the present case. As to the argument in the Court below, founded on the Bankruptcy Acts, as to the absence of any express mention in this Act of power to bar an entail, the special power in the Bankruptcy Act is historical, and this power was only inserted because it had existed in the earlier Bankruptcy Acts from the time of James I., but it must not be assumed that there is no such power whenever that power is not expressly conferred, and particularly in the Forfeiture Act, where the words are so wide and include "all the estate and interest" of the felon.

The case may be put alternatively. Assuming that the administrator has no power to bar the convict's estate tail, then

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(1) (1669) 1 Wms. Saund. 260.

(3) (1841) 9 M. & W. 113.

(2) (1846) 3 J. & Lat. 267.

(4) [1893] 2 Ch. 497.

(5) (1868) L. R. 6 Eq. 210, 213.

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we submit that the right to bar is still left in the convict. In the present case the convict is willing to bar his entail, and the purchaser is willing to accept this if the convict can legally do so. We suggest that he can. Sect. 8 of the Forfeiture Act provides that the convict shall be incapable of "alienating" his property. Alienation implies a transaction by which property is made over to another, but a disentailing assurance in the usual form is not an "alienation"; it is merely an enlargement of the estate tail into a fee simple.

[COZENS-HARDY L.J. If the convict could execute a valid disentailing deed, the estate so enlarged would vest in the administrator.]

Certainly, and then the administrator could make a good title to the fee simple. The right to disentail cannot be suspended during the conviction, otherwise a convict at the end of his sentence might be able to defeat the acts of the administrator; the right to disentail, if it is not in the administrator, is in the convict.

[COLLINS M.R. And that right can be exercised by the convict, unless there is something in the Forfeiture Act to prevent him.]

The Act in express terms does not forbid it; a disentailing assurance is neither a "charge" nor a "contract."

Further, we say that s. 12 of the Forfeiture Act gives the administrator an absolute power to sell and convey any part of the convict's property; this, by analogy to the power of sale given to the committee of a lunatic, carries with it a power to bar the entail. Sect. 124 of the Lunacy Act, 1853, giving the committee a power of sale, contains no reference to barring an estate tail, and yet the Court has power to bar the estate tail of a lunatic: *In re Pares* (1), where James L.J. expressly says (2), "The right to bar an entail is not a power."

[*Baden Fuller*, as *amicus curiæ*, referred to *In re Earl of Sefton*. (3)]

The analogy of these cases applies to the present. If the Legislature by abolishing forfeiture for treason intended to take away from the Crown the right it previously had and vest

(1) (1879) 12 Ch. D. 333.

(2) 12 Ch. D. 335.

(3) [1898] 2 Ch. 378.

it in the administrator, the intention presumably is that estates tail were intended to vest in the administrator, with full power of sale, and as incidental thereto a right to bar an estate tail. This contention is not inconsistent with the recent decision in *In re Dunsany's Settlement*. (1)

Tyldesley Jones, for the respondent, the purchaser. To deal first with the contention that the convict can still bar this entail. Sect. 8 of the Forfeiture Act, 1870, absolutely prevents the convict from barring his entail, because he has no longer any power to "dispose" of the property under s. 15 of the Fines and Recoveries Act; he cannot bar an estate tail by a deed which conveys no estate to anyone, and the power of disposition given by s. 15 must be executed by a conveyance in the ordinary way: *Peacock v. Eastland*. (2) Prior to the Forfeiture Act there was no power to bar the estate tail of a felon. The Crown would have become entitled to his estate, but on the death of the felon his issue would re-enter. An estate tail can only be barred by a disposition of the land in accordance with the provisions of ss. 15 and 40 of the Fines and Recoveries Act, and that is an "alienation" prohibited by s. 8 of the Forfeiture Act. The only case which appears to conflict with this proposition is *Lord Lilford v. Attorney-General* (3), but that is a succession duty case.

[ROMER L.J. The reasons for that dictum, as given by the Lord Chancellor (4), are most important, and tend to shew that a disposition under s. 15 is not an alienation.]

Sect. 15 confers on the tenant in tail full "power" to dispose of the estate for an estate in fee; that is a power of alienation. Assuming that a disentailing assurance is not an "alienation" prohibited by s. 8 of the Forfeiture Act, then s. 10 has transferred the estate tail to the administrator, and the convict, being no longer a tenant in tail, cannot bar the entail.

[COZENS-HARDY L.J. A person who parts with his estate tail without an enrolled deed is still an "actual tenant in tail" within s. 15, "although the estate tail may have been divested or turned to a right" (see the definition in s. 1), and therefore he can still execute a disentailing deed.]

(1) [1906] 1 Ch. 578.

(2) (1870) L. R. 10 Eq. 17.

(3) (1867) L. R. 2 H. L. 63.

(4) *Ibid.* 70.

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The definition in s. 1 does not cover this case. The words "although the estate tail may have been divested or turned to a right" were only intended to apply to the case of an estate tail having been destroyed by some assurance by a tenant in tail not barring the issue; the result of such an assurance being that the alienee takes a fee simple liable to be determined by the issue in tail, i.e., a base fee at common law: *Machil v. Clark* (1), overruling *Took v. Glascock* (2); Challis's Law of Real Property, 2nd ed. p. 293.

After such an assurance the estate tail is destroyed, for there cannot be an estate in fee simple in the alienee and a subsequent estate tail, the issue has no estate in the land, only a right of entry, or if the assurance was by feoffment, while feoffment had a tortious operation, a right of action. In the former case the estate tail was "divested," in the latter "turned to a right." But for the later part of the definition in s. 1 the issue would not be tenant of an estate tail, and therefore unable to execute a disentailing deed until he had restored the estate by entry or action.

Here the estate tail has not been "divested or turned to a right"; it has been transferred to and vested in the administrator by s. 10 of the Forfeiture Act.

[ROMER L.J. referred to the note in Carson's Real Property Statutes, p. 265, on the words actual tenant in tail "although the estate tail may have been divested or turned to a right."]

The difference between "divesting" and "turned to a right" is explained in Co. Litt. 327 b.

[COZENS-HARDY L.J. According to your argument, if a tenant in tail creates a base fee at common law he cannot afterwards bar the issue in tail at all.]

He is not enabled to do so by the definition in s. 1. He may be able to do so under later provisions of the Act, as for instance s. 19: *Bankes v. Small*. (3)

[COZENS-HARDY L.J. Sect. 19 deals with the case of a base fee under the statute, not a base fee at common law. Sect. 38 too, gives a wider power.]

(1) (1702) 2 Salk. 619; 7 Mod. 18. (2) 1 Wms. Saund. 260.

(3) (1887) 36 Ch. D. 716.

Although the effect of s. 10 of the Forfeiture Act is to vest the estate tail of the convict in the administrator, he does not become tenant in tail; the estate tail is still descendible to the issue of the donee in tail, and unless you can find an express power for the administrator to bar the entail he cannot do so, and on the death of the convict the issue can enter.

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[ROMER L.J. How does the estate tail get back to the convict on his release?]

Under s. 18 of the Forfeiture Act. As to the power of the administrator to bar the convict's estate tail, s. 12 giving a power of sale does not authorize the administrator to bar the entail and convey the fee simple. If the Forfeiture Act had intended the administrator to have this power, it would have contained an express provision to that effect; as is done in the case of the Bankruptcy Acts. The mere vesting of the property in the administrator with a power of sale is not enough. The Bankruptcy Act of 1883 vests the whole of the bankrupt's property in the trustee, but it contains an express power, as do the earlier Bankruptcy Acts, enabling the trustee to deal with estates tail. In *Hankey v. Martin* (1) Kay J. expressly says he did not think that "the vesting in the assignees," under the Bankruptcy Act (1 & 2 Will. 4. c. 56), s. 26, "had any effect on the estate tail." The analogy of the Bankruptcy Acts seems to shew that in the view of the Legislature a vesting of the estate with a power of sale does not confer on the trustee in bankruptcy, or on the administrator under the Forfeiture Act, a power to bar an estate tail.

Lunacy cases stand on a different footing, for the jurisdiction over the property of the lunatic is very wide, and besides, the powers of the lunatic are exercised by the committee on behalf of the lunatic. No property is vested in the committee.

There being no words in the Forfeiture Act transferring to the administrator the powers exercisable by the convict, or any express provision enabling the administrator to bar an estate tail, he has no such power: *Sturgis v. Morse* (2); *In re Starkie*. (3)

(1) (1883) 49 L. T. 560. (2) (1860) 2 D. F. & J. 223, 233.

(3) (1834) 3 My. & K. 247.

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The Fines and Recoveries Act speaks of "a power of disposition" in ss. 15, 16, and 18; a "power" to enlarge a base fee in s. 19; a "power to consent" to a disposition by a lunatic is given to the Lord Chancellor by s. 48. Sects. 64 and 67 speak of the "power" of disposition given to the commissioners of bankrupt tenants in tail. There is nothing in the Forfeiture Act vesting the statutory "powers" of the Fines and Recoveries Act in the administrator. The decision of Kekewich J. on this point was right.

Earle, in reply. Sect. 38 of the Fines and Recoveries Act confers a very wide power on a tenant in tail to confirm voidable estates created by him, and if there is any interest still left in the convict he can execute a deed which will confirm the estate now vested in the administrator, and so enable him to make a title: *Bankes v. Small*. (1) If the estate tail is still vested in the convict, he can execute a confirmation deed; this will not be an alienation, but an enlargement. The observations in *Lord Lilford v. Attorney-General* (2) are in favour of this contention. On the question of the power of the administrator to bar the entail, the analogy of *In re Pares* (3) is precisely in point.

COLLINS M.R. We have had the utmost possible assistance from counsel on both sides in this case, and we are much indebted to them. We will take time to consider our judgment.

Cur. adv. vult.

April 11. COZENS-HARDY L.J. delivered the judgment of the Court (Collins M.R., Romer and Cozens-Hardy L.JJ.) as follows:—The question in this appeal turns upon the operation and effect of the Fines and Recoveries Act and the Forfeiture Act, 1870. A tenant in tail in possession was found guilty of felony, and Mr. Gaskell was, in pursuance of s. 9 of the Act of 1870, appointed administrator. He executed a deed dated July 5, 1905, by which he purported to grant the property "of which the said F. H. Gaskell is now by any means tenant

(1) 36 Ch. D. 716.

(2) L. R. 2 H. L. 63.

(3) 12 Ch. D. 333.

in tail freed and discharged from all estates in tail of the said F. H. Gaskell to the use of the said F. H. Gaskell, his heirs and assigns for ever." This deed was duly enrolled. Gaskell has contracted to sell the property to Walters, and objection was taken that a good title was not shewn. We may observe that in any view the form of the disentailing assurance was wrong, for Gaskell was not tenant in tail. But as Walters is a willing purchaser, the matter has been argued before us on the broad question, first, whether the administrator can bar the entail and sell the fee, and secondly, if he cannot, whether the felon himself can bar the entail, and thus enable the administrator to sell the fee.

On the first point Kekewich J. has decided against the title, and we agree with his judgment. Sect. 10 provides that all the real and personal property to which the felon was at the time of his conviction or shall afterwards, while he shall continue subject to the operation of the Act, become or be entitled shall vest in such administrator for all the estate and interest of such convict therein, and by s. 12 the administrator has absolute power to let, mortgage, sell, convey, and transfer any part of such property as to him shall seem fit. What then is the effect of the vesting clause upon an estate tail? In our opinion it can only vest in the administrator a conditional fee determinable by entry of issue or remaindermen. An estate tail is incapable of being transferred. It is important to observe that in the somewhat similar provisions in the Bankruptcy Acts there is to be found, in addition to a wide vesting clause, an express power to bar the bankrupt's estate tail by a deed operating under the Fines and Recoveries Act. No such express power is found in the Act of 1870, and the administrator does not bring himself within the definition clause in the Fines and Recoveries Act as a tenant in tail able to dispose of the fee simple. It was urged that such a power ought to be implied from s. 12, which empowers the administrator to sell such property; but that section only authorizes him to sell such property of the felon as is vested in him, the nature of which has been indicated above. It does not enable him to execute a deed which shall have the effect of barring both issue and remaindermen with a view to a subsequent sale. The

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analogy of the jurisdiction in lunacy to bar the estate tail of a lunatic does not really assist the appellant. The language of the Lunacy Acts is very different. The committee executes every deed in the name and on behalf of the lunatic. No property is vested in the committee. Moreover, jurisdiction over the property of a lunatic under the Statute de Prerogativa Regis is larger and wider than that which is expressed within the four corners of the modern Lunacy Acts: see *In re Earl of Sefton*. (1)

Assuming this to be so, it remains to consider what is the position of the felon himself. Although a determinable fee is vested in the administrator by virtue of s. 10 of the Forfeiture Act, 1870, the felon, unless s. 8 prevents, is still the person who is competent to execute a disentailing assurance under the Fines and Recoveries Act. Sect. 38 shews that this is so, and the judgment of Cotton L.J. in *Bankes v. Small* (2) is an authority in support of this view. It is, however, urged that under s. 8 of the Forfeiture Act, 1870, a felon is incapable of "alienating or charging any property," and that, therefore, his deed is void. This is a point of some difficulty, but upon the whole we think that a deed by which the felon simply grants the property to a grantee and his heirs to hold to the grantee and his heirs, to the use of himself, his heirs and assigns, is not an "alienation." Alienation implies a transaction by which property is given to another person, but here there is no other person, unless a grantee to uses can be so regarded. The case of *Lord Lilford v. Attorney-General* (3) supports the view that such a disentailing assurance is not an alienation, and that it operates rather by way of enlargement of the estate tail. Assuming that a deed of the nature above indicated is executed by the felon and enrolled, the fee simple thus acquired will vest in the administrator under s. 10, and by this means a good title can be made.

It is right to add that this point does not seem to have been taken before Kekewich J. Probably the better course will be that the appeal should stand over until after such a disentailing assurance has been executed by the felon and enrolled, and that

(1) [1898] 2 Ch. 378.

(2) 36 Ch. D. 716.

(3) L. R. 2 H. L. 63.

an order should then be made discharging the order under appeal and declaring that a good title has been made. We have not been asked to make any order as to costs.

Solicitors: *Gibson & Weldon, for F. H. Gaskell, Cardiff; Field, Roscoe & Co., for Collins & Woods, Swansea.*

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In re HUNT'S SETTLED ESTATES.

[1904 H. 2491.]

BULTEEL *v.* LAWDESHAYNE.

[1905 B. 561.]

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Settled Land—Capital Money—Investment—Direction by Tenant for Life to invest—Improper Investment within Letter of Power—Control of Court—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 21, 22, sub-s. 2; s. 53.

A tenant for life under the Settled Land Act, 1882, directed the trustees of the settlement to invest capital moneys in their hands in the purchase of certain leasehold houses. The trustees procured the report of an independent surveyor shewing that the proposed investment, though within the words of the power given by the Act, was undesirable, and they declined to proceed with the purchase. Farwell J. held (1.) that, assuming the direction was given bona fide, the trustees were not bound to act upon it; (2.) that it was not given bona fide.

Appeal from this decision on the question of fact dismissed.

Collins M R. and Cozens-Hardy L.J. also expressed their concurrence with the observations of the learned judge as to the law.

APPEAL from a decision of Farwell J. (1)

In an action brought by remaindermen against a tenant for life under the Settled Land Acts and others, Farwell J. declared that a certain direction for investment given by the defendant Lawdeshayne, the tenant for life, was not given bona fide and ought not to be followed by the trustees of the settlement, and he ordered the defendants Lawdeshayne and Leppard to pay the costs of the action. The defendants Lawdeshayne and Leppard appealed.

(1) [1905] 2 Ch. 419.

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Butcher, K.C., and *A. F. Peterson*, for the appellants.
Upjohn, K.C., and *Jolly*, for the remaindermen.
Rolt, for the trustees.

THE COURT (Collins M.R., Romer and Cozens-Hardy L.JJ.)
dismissed the appeal on the facts.

COZENS-HARDY L.J., after dealing with the question of fact, continued :—The learned judge in the first part of his judgment dealt with the general considerations of law as regards the duties of a tenant for life in such a case as this. I only desire for myself to say that I absolutely and entirely agree with all that was said by Farwell J. on the point of law.

COLLINS M.R. I entirely concur in the last observation of Cozens-Hardy L.J.

Solicitors : *H. C. Knight ; Morgan & Upjohn.*

H. B. H.

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CORBETT *v.* SOUTH EASTERN AND CHATHAM RAILWAY
COMPANIES' MANAGING COMMITTEE.

[1904 C. 2465.]

Railway Company—Private Act—Statutory Obligations—Statutory Contract with Landowner—Subsequent Contract in Derogation of same—Public Rights—Ultra Vires—Specific Performance—Damages.

In 1887 the private Act of a railway company contained provisions for the protection of B., a landowner, whereby the company was bound, unless otherwise agreed between the company and B., to construct and maintain a station at W. close to B.'s property ; the station was in due course erected. In 1900 the company's undertaking was transferred to and became vested in the South Eastern Railway Company, who subsequently, in ignorance of the provisions of the Act of 1887, contracted for valuable consideration with the plaintiff to pull down the station at W. and erect another nearer to the plaintiff's property. In an action by the plaintiff for specific performance or damages :—

Held (Romer L.J. dissenting), that the contract with the plaintiff was ultra vires, as it was not competent to a railway company to take the land and then to do that which the statute prohibited, and it made

no difference that the prohibition was not in the interest of the general public, but for the protection of a private owner, and that the action must be dismissed.

Decision of Farwell J., [1905] 2 Ch. 280, reversed.

APPEAL from a decision of Farwell J. (1)

As the material sections of the various railway Acts, the contract in question, and the facts are fully set out in the report of the case in the Court below, the following summary will be sufficient to make the arguments and judgments intelligible:—

By s. 19 of the Bexley Heath Railway Act, 1887, the Bexley Heath Railway Company agreed with Sir H. Barron, his heirs and assigns (therein referred to as the owner), that the company would, unless otherwise agreed between the company and the owner, construct and maintain a station for both passengers and goods at a certain point of their railway; and in pursuance of this contract the company constructed a station known as the Well Hall Station.

In 1900 the company's railway and undertaking were by an Act of Parliament transferred to and became vested in the South Eastern Railway Company.

In October, 1900, the defendants entered into a written contract with the plaintiff whereby for valuable consideration they agreed to pull down the Well Hall Station and in lieu thereof to erect a new station nearer to property of the plaintiff which he was developing as a building estate. The defendants entered into this contract in good faith and in ignorance of the provisions of s. 19 of the Bexley Heath Railway Act, 1887; and as soon as the matter was brought to their knowledge they informed the plaintiff that they could not fulfil their contract with him on the ground that it was ultra vires. Thereupon the plaintiff commenced this action, claiming specific performance of the agreement of October, 1900, and alternatively damages for the breach thereof.

Sir H. Barron was dead, and it was admitted that his successors in title would not consent to the removal of Well Hall Station.

Farwell J. held that the contract with Sir H. Barron did not

(1) [1905] 2 Ch. 280.

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create any public rights; that it was not illegal or ultra vires the defendants to contract with the plaintiff to remove the station at Well Hall without first obtaining the consent of Sir H. Barron, and that as such consent could not be obtained, the defendants were liable in damages to the plaintiff for the breach of their contract with him.

The defendants appealed.

Neville, K.C., and *A. Adams*, for the appellants. A railway company is the creature of statute, and is limited in its right to contract by the powers expressly or impliedly given to it by Parliament: *Ashbury Railway Carriage and Iron Co. v. Riche*. (1)

[*COZENS-HARDY L.J.* referred to *Davis & Sons, Ltd. v. Taff Vale Ry. Co.* (2) and *Joseph Crosfield & Sons, Ltd. v. Manchester Ship Canal Co.* (3)]

[*ROMER L.J.* Is not the ratio decidendi of *Davis & Sons v. Taff Vale Ry. Co.* (2) that the contracting parties were really contracting for the benefit of the public?]

Under s. 19 of the Act of 1887 the defendants are under an obligation to construct and maintain a public station at a particular point, and although that obligation may be released by agreement between the parties in manner provided by the section, yet, so long as that obligation continues, the public may have the benefit of it, and the defendants cannot contract with a third party to get rid of it. But assuming that this section is solely for the benefit of the landowner, it is a misapprehension to say that a statutory provision for the benefit of a particular person is analogous to a contract by a private person outside the authority of Parliament.

The defendants have by the terms of the Act a right to contract with the owner and with no one else, and the contract now in question is one which the defendants are not expressly or impliedly authorized to enter into and is ultra vires. The test of that is whether a shareholder could maintain an action to restrain the defendants from carrying out the contract. We submit that he could; and if the contract is ultra vires, damages

(1) (1875) L. R. 7 H. L. 653.

(2) [1895] A. C. 542, 552.

(3) [1904] 2 Ch. 123; [1905] A. C. 421.

cannot be recovered for the breach of it. In the case of an individual, the fact that he has agreed with some one in a manner inconsistent with his subsequent contract does not relieve him from liability thereunder, because he has a free power of contracting; but the provisions of s. 19 limit the contracting power of the corporation so long as they remain in force, that is, until they are released by Sir Henry Barron or his representatives. There being a statutory obligation on the defendants to erect and maintain a station in a particular place, they cannot demolish that station, whether the section is in favour of a private individual or not.

[ROMER L.J. It would not be ultra vires for the defendants to contract with the owner to release his rights under this section. Then is it ultra vires for them to contract with an individual that they will procure the owner's consent to release his rights?]

Yes, because the defendants by their constitution are not authorized to contract in that manner: *Baroness Wenlock v. River Dee Co.* (1); *East Anglian Rys. Co. v. Eastern Counties Ry. Co.* (2) The cases of *Savin v. Hoylake Ry. Co.* (3) and *Hampstead Corporation v. Midland Ry. Co.* (4), on which Farwell J. relied, are distinguishable, and in neither of them was there any discussion of the question of ultra vires. *Savin v. Hoylake Ry. Co.* (3) was distinguished in *In re Brompton and Longtown Ry. Co.* (5), and the view of the Court as to the powers of public companies has undergone a change in consequence of the decision of the House of Lords in *Ashbury Railway Carriage and Iron Co. v. Riche*. (6)

Sir R. B. Finlay, K.C., H. Courthope-Munroe, and Langston, for the respondent, the plaintiff. The decision in *Ashbury Railway Carriage and Iron Co. v. Riche* (6) is distinguishable from the present case. The point in that case was that the parties were really contracting for the benefit of the public; in the present case s. 19 is only inserted for the protection of Sir H. Barron, and the Attorney-General could not intervene. The

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(1) (1885) 10 App. Cas. 354, 359.

(4) [1904] 2 K. B. 802; [1905] 1

(2) (1851) 21 L. J. (C.P.) 23, 26.

K. B. 538.

(3) (1865) L. R. 1 Ex. 9.

(5) (1875) L. R. 10 Ch. 177.

(6) L. R. 7 H. L. 653.

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object of s. 19 was to prevent any question being raised as to the contract between Sir H. Barron and the company being ultra vires the company; s. 19 was "limited to the interests of the persons mutually obliged," in the words of Lord Watson in *Davis & Sons, Ltd. v. Taff Vale Ry. Co.* (1), and did not impose any "obligation in favour of" the public or third parties. Sect. 19 is nothing more than a private bargain between the Bexley Railway Company and Sir H. Barron; it contains no terms which are not within the powers of the railway company, and it ought to be regarded as nothing more than a contract under seal between the railway company and Sir H. Barron in the terms of s. 19. The fact that the company cannot carry out the contract of October, 1900, owing to the death of Sir H. Barron, does not make that contract ultra vires.

A statutory contract may be waived or released by the party for whose benefit it is enacted: *Goldsmid v. Great Eastern Ry. Co.* (2) The argument that this contract is ultra vires seems to be disposed of by *Savin v. Hoylake Ry. Co.* (3)

There is nothing in the nature of this bargain to make it ultra vires for a railway company to agree to do that which under their Act they can do if they get the required consent. If it had been ultra vires the company in *Hampstead Corporation v. Midland Ry. Co.* (4) to enter into any arrangement with regard to the land in question in that case, unless and until they had obtained an agreement, it is difficult to see how the Courts in that case could have held the company to be in the position of owners. There is no prohibition in the Bexley Heath Railway Act, 1887, against the company contracting to remove this station, and that they will obtain Sir H. Barron's consent; such a contract would be potentially good.

Neville, K.C., in reply. *Hampstead Corporation v. Midland Ry. Co.* (4) does not apply to this case. There the question of ultra vires was not raised; the only point decided was that the company were "owners" within the definition clause. It is not true to say that so long as the agreement made by s. 19 lasts

(1) [1895] A. C. 552.

(2) (1883) 25 Ch. D. 511, 536.

(3) L. R. 1 Ex. 9.

(4) [1904] 2 K. B. 802; [1905] 1 K. B. 538.

Sir H. Barron is the only person interested. The observations of Lord Watson in *Davis & Sons, Ltd. v. Taff Vale Ry. Co.* (1) were addressed to the point whether any third person had a right conferred upon him by a statutory contract of this kind, and have no direct bearing upon the question of ultra vires. This was not a private station: it is a public station, and the public have just the same right to sue as in *Davis & Sons, Ltd. v. Taff Vale Ry. Co.* (1)

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Cur. adv. vult.

May 15. ROMER L.J. In this case I agree with the decision of Farwell J. and the reasons given by him for that decision, which I need not now repeat. I will only add a few observations of my own.

It has been suggested that the fact that the public have a right to use the station, the subject of the clause in the Act with which this appeal is concerned, supports the view that the clause created a public right. But the public have the right to use any station for the time being provided by the railway company, though the company may be able to remove it at its pleasure if circumstances render such a course desirable, and the question that arises on this appeal concerns not the use of the station while it exists, but the right to remove it; and from the wording of the clause it is clear that the owner as there defined and the company may, if they please, remove the station at any moment without the public having the slightest right to intervene. The clause appears to me to be framed so as to make it clear that it constitutes only a contract between the owner and the company. I should gather that the object of the Legislature in inserting the clause in the Act was to prevent any question being raised as to the contract between the owner and the company being ultra vires the company, and possibly also to make it clear exactly what the contract was and to prevent disputes arising as to its terms. At any rate, it appears to me, using the language employed by Lord Watson in the case of *Davis & Sons, Ltd. v. Taff Vale Ry. Co.* (1), that the clause "was limited to the interests of the parties mutually obliged" (that is, the owner and the company), and did

(1) [1895] A. C. 552.

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not impose upon those parties or either of them any "obligation in favour of" the public or third parties.

This view really disposes of the case. For if the clause only amounts to a legislative recognition of and sanction to a contract between the owner and the company, it appears to me impossible to say that the contract sued upon in this action was ultra vires the company, however imprudent it may have been for the company to enter into it. The plaintiff may by reason of the clause in the Act be affected with notice of it. But that would not render the plaintiff's contract void. It was for the company to take care that it had so arranged with the owner as to justify it in making the contract with the plaintiff. The plaintiff was entitled to assume that his contract, not being ultra vires the company, was one that the company thought itself justified, under the circumstances known to it, in entering into. For this purpose no distinction can be drawn between the contract of the owner and the company being one inserted in the Act and that contract being one not so inserted, but one the existence of which the plaintiff was aware of. Whether the company was imprudent or not in making the contract with the plaintiff was a matter for the company, and not for the plaintiff.

I think, therefore, the appeal should be dismissed; but, as my brethren are of an opposite opinion, the appeal will be allowed.

COLLINS M.R. In this case I agree with the judgment which is about to be delivered by Cozens-Hardy L.J.

COZENS-HARDY L.J. The short question in this appeal is whether an agreement dated October 13, 1900, by which the defendant company purported to agree with the plaintiff (inter alia) to discontinue the use of the present Well Hall Station and in lieu thereof to erect a new station, is ultra vires and, therefore, illegal by reason of s. 19 of the Bexley Heath Railway Act, 1887. The defendant company is the successor of the Bexley Heath Railway Company and subject to all the obligations of that company. Sect. 19, so far as material, is in the following

words: "For the protection of Sir Henry Page Turner Barron, Baronet, his heirs and assigns (hereinafter referred to as and included in the expression 'the owner'), the following provisions shall unless otherwise agreed between the company and the owner have effect (that is to say)." Then sub-s. 4 is: "The company shall construct and maintain a station for both passengers and goods, with all proper and sufficient works and accommodation and access to and from the estate of the owner, at the point of junction of the railway authorized by this Act with railway No. 1 authorized by the Act of 1883, or as near thereto as the levels and other circumstances will permit." It is urged on the part of the appellants that s. 19 contains a statutory obligation which is still in force to maintain the station which, by the contract of October, 1900, the appellants have agreed to remove, and that it makes no difference that the obligation imposed by s. 19 might be waived or released by Sir Henry Barron. In other words, the appellants urge that there is a statutory conditional prohibition against doing that which they purport to bind themselves to do by the contract in question, and that, unless and until the condition is got rid of, the contract is ultra vires and illegal. On the other hand it is urged that, when s. 19 is looked at, it is nothing more than a private bargain between the company and Sir Henry Barron; that it contains no term which was not within the competence of the railway company, and that no rights are conferred thereby upon the public, and that it ought to be regarded as having no greater or other effect than a contract under seal between the company and Sir Henry Barron in the precise terms of s. 19 and not mentioned in the Act of Parliament would have had. Farwell J. has adopted the latter view, and held the company liable to pay damages, although the plaintiff cannot obtain specific performance.

Now it is important to observe that the Bexley Heath Railway Company, though incorporated in 1883, had no power to take the land or make the railway mentioned in s. 19 except under the powers and subject to the restrictions contained in the Bexley Heath Railway Act, 1887, and the Acts incorporated therewith. A railway company is an artificial person incorporated

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by statute, and the limits of its powers are prescribed either expressly or by implication by statute. In the language of Lord Watson in *Baroness Wenlock v. River Dee Co.* (1), "Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions." A contract not within the limits as above defined is ultra vires, illegal, and wholly void: *Riche v. Ashbury Railway Carriage and Iron Co., Ltd.* (2) It is not necessary to find words of prohibition to render such a contract illegal, but the presence of such words is important as establishing beyond doubt that such a contract is not within the powers of the company. It is well known that railway Acts frequently confirm a scheduled contract, and it may be that in such a case the contract, though confirmed by statute, will, for some purposes, have no further or greater effect than a contract not confirmed by statute: see per Lord Watson in *Davis & Sons, Ltd. v. Taff Vale Ry. Co.* (3) The observations of Lord Watson were, however, addressed to the point whether any third person had a right conferred upon him by such a statutory contract; and they have no direct bearing upon the question of ultra vires. But where the statute does not confirm a scheduled contract, but contains an express enactment imposing certain obligations upon the company, it is not, in my opinion, necessary for the purpose of the doctrine of ultra vires to consider whether they are imposed for the benefit of the public or a class of the public or for a private individual owning a particular estate. The effect of the statutory obligations upon the powers of the company must in each case be the same. Nor does it make any difference that by the terms of the statute the obligations may be varied or released by agreement between the company and a private individual. The obligations remain, until varied,

(1) 10 App. Cas. 362.

(2) (1874) L. R. 9 Ex. 224, 262.

(3) [1895] A. C. 552, 553.

statutory obligations. *Joseph Crosfield & Sons, Ltd. v. Manchester Ship Canal Co.* (1) is an illustration of this. Farwell J. has held that s. 19 constitutes merely a contract between the company and Sir Henry Barron, and that no question of ultra vires arises. With great respect for the learned judge, I am unable to assent to this view. Sect. 19 is not in form an agreement. It is in form a statutory enactment, and none the less so because its terms may be varied by agreement between the company and Sir Henry Barron. The section has not been varied, and it therefore remains in full force. The company's powers to take and use the land and to make the railway were subject to the conditions found in s. 19. It is not competent to the company to take the land and then to do that which the statute has prohibited, and, in my opinion, it makes no difference that the prohibition was not in the interest of the general public, but for the protection of a private owner. If the company had only agreed with the plaintiff to use their best endeavours to procure a release by Sir Henry Barron from the obligations imposed by s. 19, and, in the event of such release being procured, then to discontinue the use of the present Well Hall Station, such an agreement might not have been ultra vires. But I cannot hold that this is the effect of the agreement of October, 1900, nor can I regard the objection as simply one of title. The question of defect of title can only arise if there is a valid contract; and it has no relevance where the doctrine of ultra vires negatives the existence of a contract.

For these reasons I think the appeal must be allowed and the action dismissed with costs here and below.

Solicitors: *King, Adams & Co.*; *J. W. Watkin.*

(1) [1904] 2 Ch. 123; [1905] A. C. 421.

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TUNNICLIFFE & HAMPSON, LIMITED *v.* WEST
LEIGH COLLIERY COMPANY, LIMITED.

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March 7, 9 ;

May 9.

[1903 T. 3619. Manchester.]

*Damages—Subsidence—Measure of Damages—Risk of Future Subsidence—
Remoteness.*

In assessing the damages recoverable by a surface owner for subsidence owing to the working of minerals under and adjoining his property, the Court will take into account the depreciation in the market value of the property attributable to the risk of future subsidence.

So held by the Court of Appeal (Romer L.J. dissentiente).

Decision of Swinfen Eady J., [1905] 2 Ch. 390, reversed.

Rust v. Victoria Graving Dock Co., (1887) 36 Ch. D. 113, distinguished.

APPEAL from a decision of Swinfen Eady J. (1)

The plaintiffs were the owners and occupiers of certain mills, and they brought this action to recover damages for injury to the mills by subsidence owing to the removal of minerals by the defendants. Judgment was taken by consent directing an inquiry as to what damages the plaintiffs were entitled to by reason of the acts of the defendants, and this inquiry was referred to an official referee. The official referee as to the cost of repairs assessed the damages at 1300*l.*, and he assessed the damages for depreciation of the premises and otherwise at 13,200*l.* This latter finding the defendants impeached.

Swinfen Eady J. came to the conclusion that the official referee in assessing the damages for depreciation had improperly taken into account the risk of future damage, and he held that the plaintiffs were entitled to recover the difference in value between the mills before they were injured and the mills after they had been repaired, as far as possible, eliminating, however, anything whatever in respect of depreciation in value for future apprehended damage or the risk of future injury from subsidence.

The plaintiffs appealed.

Cripps, K.C., *Langdon, K.C.*, and *F. L. Wright*, for the plaintiffs. The only question arises as to the third head of

(1) [1905] 2 Ch. 390.

damages, the damages for depreciation of the premises, assessed by the official referee at 13,200*l*. The plaintiffs in asserting their claim for damages under this head admitted that they were only entitled to damages in respect of the subsidence which had actually occurred, and that they could not claim in respect of subsidences which had not yet occurred, but the learned judge came to the conclusion that the official referee in assessing the damages could not have arrived at so large a sum without taking into account possible future subsidences. We say that the learned judge misapprehended the view of the official referee. The authorities shew that the cause of action is the subsidence, and not the working, that it arises at the time when the damage is actually sustained, and that any subsequent subsidence must be the subject of a separate action; but they also shew that in ascertaining the measure of damage not only the cost of the repairs necessitated by the subsidence, but the general depreciation in the value of the property must be taken into account: *Bonomi v. Backhouse* (1); *Mitchell v. Darley Main Colliery Co.* (2); *Hosking v. Phillips*. (3) As was said by Parke B. in the last-mentioned case (4), "the proper measure is by how much less the premises would sell in consequence of the wrongful act of the defendant." Something must be allowed for the prejudice in the mind of a purchaser owing to the fact that he is buying damaged property. It is submitted that the fear of a possible purchaser of the risk of a further subsidence ought to be taken into account in estimating the actual damage caused by the past subsidence, because that consideration does in fact operate on his mind. We say that the 13,200*l*. represented the diminution in the selling value of the property consequent upon the injury which has already accrued, and that the official referee in arriving at that figure adopted the right principle.

Pickford, K.C., and *A. H. Jessel*, for the respondents. There is only one cause of action at present, the damage arising from the subsidence: *Bonomi v. Backhouse*. (1) In that damage there cannot be included damage which would of itself be a fresh cause of

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(1) (1858) E. B. & E. 622, 638; (1886) 11 App. Cas. 127.
(1861) 9 H. L. C. 503. (3) (1848) 3 Ex. 168.
(2) (1884) 14 Q. B. D. 125, 134; (4) 3 Ex. 182.

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action, and the possibility of future subsidence by reason of the present subsidence cannot be taken into account. The damages arising from the present subsidence must therefore be measured without any regard to the possibility of future subsidence: *Mitchell v. Darley Main Colliery Co.* (1), overruling *Lamb v. Walker*. (2) *Rust v. Victoria Graving Dock Co.* (3) is a direct authority for the proposition that the mere apprehension of future loss is not a legitimate ground for giving damages. If the diminution of market value is the true criterion, that means the diminution arising from actual subsidence, and there is no authority that market value is to include the apprehension of future damage arising from past subsidence. [They also referred to *Battishill v. Reed*. (4)]

Cripps, K.C., in reply.

Cur. adv. vult.

May 9. COLLINS M.R. The question in this appeal is as to the measure of damages for subsidence brought about by the working of coal under and adjoining certain mills and works of which the plaintiffs are owners and occupiers. It is assumed in the case that the defendants in conducting their operations were not trespassers. There is no doubt that the damage was very serious. The learned judge thus summarizes it (5): "Not only had the cracks been very numerous, but in one mill the floor of the spinning-shed had parted from the wall; in the other mill the joists carrying the floor had been pulled out of the wall, and had to be supported by angle-irons built into the wall; some of the walls were much out of plumb; indeed, both mills had been much shaken and damaged. Even after the expenditure of the amount allowed by the official referee for repairs, the appearance and condition of both mills will be very different from what they were before the subsidence." In giving judgment (I quote from the previous report of this case) "the official referee said that the depreciation was the difference in market value of the premises before and after the damage, and must be estimated on

(1) 14 Q. B. D. 125; 11 App. Cas. 127.

(2) (1878) 3 Q. B. D. 389.

(3) 36 Ch. D. 113, 131.

(4) (1856) 18 C. B. 696.

(5) [1905] 2 Ch. 391, 395.

the basis of what a purchaser would give if the plaintiffs wanted to sell. They were not bound to retain their premises for a certain period, and then ascertain the damage. It must be assessed now. He did not propose to give any compensation for possible future damage, except so far as the present damage would interfere with the price to be given by a possible purchaser. That was not future but present damage. Future damage, if it occurred, would be compensated for in the future. There was no doubt, however, that a purchaser would be influenced by the fact that the premises had been damaged, that there might be further subsidence, that the subsidence had been going on some time and after a temporary abatement was still continuing, that the premises were dilapidated, and that at present no one could see how much more damage would occur, or when the subsidence would come to an end.” Though they differed as to the extent, both sides, as pointed out by the learned judge, agreed that the market value of the premises was depreciated by the risk of future subsidence. The learned judge was of opinion that the official referee had taken the apprehension of future risk into consideration, and that in so doing he was wrong. The plaintiffs appealed. Before attempting to solve the question thus raised for our decision, it is desirable to narrow the field of controversy by eliminating therefrom certain relevant propositions which are well established. In the first place, I think it must be admitted that the selling value before and after the injury, accidental circumstances not connected with the injury being eliminated, affords the measure of depreciation. The learned judge has accepted this, and I think there is abundant authority for it: see Mayne on Damages, 7th ed. p. 463, and cases there cited; and the judgment of Wightman J. in *Bonomi v. Backhouse*. (1) Further, that though modern decisions have altered the old view as to what constituted the cause of action in cases of withdrawal of support to other land by an owner working in his own land, the broad principle that all damage actual and prospective legally following from the cause of action sued on must be recovered once for all stands unshaken: see Mayne on Damages, 7th ed. p. 112, and cases

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(1) E. B. & E. 622, 638.

C. A. there cited. Further, that in that damage cannot be included
 1906 damage which would of itself be a fresh cause of action:
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 TUNNICLIFFE Mayne on Damages, 7th ed. p. 110. This last proposition was  
 & HAMPSON, that upon which the defendants mainly relied and upon which the  
 LIMITED learned judge has given judgment. He has held that the decision  
 v. of the learned referee sins against this principle, and that to hold  
 WEST LEIGH that the depreciation in market value attributable to the risk of  
 COLLIERY of further subsidence can be taken as an element in assessing the  
 COMPANY, damages flowing from the original cause of action is in effect, as  
 LIMITED, contended by the defendants, to give to the plaintiffs damages  
 Collins M.R. for a cause of action that has not yet arisen and may never arise  
 as part of his compensation for the actionable wrong which he  
 has already sustained. With the greatest respect to the learned  
 judge, I am unable to accept this view. In my opinion this  
 particular head of damage flows directly from the already con-  
 summated cause of action, and would form no part of a second  
 cause of action should a fresh subsidence take place. The first  
 subsidence has established that the plaintiffs' mills are within the  
 area of danger created by the act of the defendants. They have  
 by the act of the defendants already completed been changed  
 from the position of premises presumably stable into that  
 of premises presumably unstable; and this fact must affect  
 the value of the property as a saleable thing. Why is the  
 person whose wrongful act has caused this to be freed from  
 liability in damages for it? No reason has been suggested,  
 unless it can be treated as giving ground to a fresh cause of  
 action. But it is clear that it is not a fresh cause of action; it  
 is an inevitable incident of the first. Furthermore, it could not  
 form part of the damages for a second subsidence, should one  
 take place. What would be the measure of damages on a second  
 subsidence? Surely (accidental circumstances being eliminated)  
 the difference in the saleable value before the fresh subsidence  
 and the like value after it. Test it in this way: Suppose after  
 the first subsidence the owner sells the premises. He cannot  
 persuade any buyer to leave out of calculation the possible risk  
 of future damage, and is obliged to accept a price reduced by  
 that consideration. Suppose now a second subsidence takes place,  
 and the buyer brings his action. Surely he will not be allowed



to recover more than the difference between the value of the property as evidenced by what he paid for it, assuming that it represented the then fair market value, and the price which it would fetch in the market after the fresh subsidence. But though the illustration of an intermediate sale brings out the point, I think it is quite clear that the measure of damages would be the same if the second action were between the original parties; and the reason is, as it seems to me, because in truth and in fact the depreciation which the referee took into consideration was brought about by and attributable to the first subsidence and not to the second. It exists now equally whether another subsidence does or does not take place. In my opinion, therefore, this element of damage cannot be excluded on the ground that it forms part of a fresh cause of action. Neither will the allowance of this factor in the damages involve a recurrence to the old rule which was displaced by the decision in *Darley Main Colliery Co. v. Mitchell* (1), namely, that damages should be given once for all for all future possible subsidences arising from the original cause. This is at once apparent by recurring to the standard of market value before and after the subsidence. Under the old rule what would have been tendered for sale after compensation paid for the subsidence would have been the premises without any right of action in respect of any fresh subsidence. Under the present rule the buyer would acquire a fresh right of action for each subsequent subsidence attributable to the original cause. Assuming the defendant to be solvent, the right of action ought to enhance the price and therefore reduce the damages claimable by the vendor. The measure of damages, therefore, now contended for would be less than that recoverable under the old law, the difference being measured exactly by the market value of the new factor. But it is suggested that apart from the question of fresh cause of action, this head of damage is irrecoverable, and *Rust v. Victoria Graving Dock Co.* (2) was cited. But I think that case is clearly distinguishable. The defendants there had been negligent in not building a wall high enough to keep out flood water at a certain point, and they had come under the obligation of a judgment which virtually forced them to raise

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(1) 11 App. Cas. 127,

(2) 36 Ch. D. 113.

C. A.      it to the necessary height. The plaintiffs' land had been flooded  
1906      and certain houses damaged, and the Court of Appeal, while  
TUNNICLIFFE      allowing the expense of repairing the houses and the rent during  
& HAMPSON,      the repair, disallowed a sum estimated by a referee as a loss  
LIMITED      likely to arise from reduced rental for four years after the  
v.      repairs were completed, in consequence of the prejudice against  
WEST LEIGH      the neighbourhood caused by the flood. The Court of Appeal  
COLLIERY      thought that this was damage which was not the natural result  
COMPANY,      of or directly caused by the flood. As pointed out by counsel  
LIMITED.      for the defendants, the neighbourhood remained just the same  
Collins M.R.      after as before the flood, though the attention of persons interested  
                 might have been drawn by the fact of the flood to the relative  
                 levels of the land and the water, which might make it an  
                 unattractive place of residence. But this unattractiveness was  
                 not brought about by the flood or attributable to anything done  
                 by the defendants, and could not therefore be a ground of damage  
                 against them. They had removed the cause of the mischief for  
                 which they were responsible by raising the level of the wall, and  
                 so far as they were concerned the neighbourhood had been  
                 restored to a position of security against flood damage. It is  
                 obvious that these considerations do not apply to this case. Here  
                 the condition of the plaintiffs' premises has been radically  
                 changed by the acts of the defendants. Those acts have pro-  
                 duced a permanent and practically irremediable state of things in  
                 the strata on which the plaintiffs' premises depended for support.  
                 In the words of the referee above cited, "The subsidence had  
                 been going on some time and after a temporary abatement  
                 was still continuing . . . and that at present no one could see  
                 how much more damage would occur, or when the subsidence  
                 would come to an end." I think there was too much tendency,  
                 in the argument for the defendants, to isolate the actual subsi-  
                 dence as the only matter to be considered. But the subsidence  
                 itself can found no action against the defendants unless it can  
                 be traced to their agency. The fact of the subsidence proves  
                 that the defendants have overstepped their rights and withdrawn  
                 support necessary to the stability of the plaintiffs' soil. Must  
                 the damages be necessarily the same, however clear the indica-  
                 tions may be that the movements of the strata will continue or

have come to a final end? Why are the plaintiffs' premises to be deemed unaffected in value by the greater or less probability of further subsidence? The plaintiffs' original right to support carried with it a right to expect that such support would not be withdrawn. This presumption of continuity was an element in the value of their property, and if that presumption is impaired as a consequence flowing from the defendants' tortious act, why are the defendants excused from making compensation? Unless the plaintiffs can get it in this action it would seem that they cannot recover at all. The original wrong is greater or less according as it is more or less probable that further damage will ensue, and I can see no reason why the original wrong-doer should not be responsible for all damage legally attributable to his acts which does not of itself constitute a new cause of action. In my opinion the appeal ought to be allowed.

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ROMER L.J. The question arising on this appeal concerns a particular head of damage claimed by the plaintiffs in respect of subsidence of their land caused by the defendants' underground workings. This head of damage may be stated as follows: It is said by the plaintiffs that the subsidence has given rise to a fear that the defendants' workings may be such as to cause further subsidences, and that this fear has caused a diminution in the value of their land, even though, if further subsidences do occur, the damage thereby occasioned would be recoverable from those causing them; and the plaintiffs accordingly contend that the diminution in value so arising is part of the damage now recoverable by them from the defendants by reason of the existing subsidence caused by the defendants.

The question is whether this contention is sound.

It is clear that the damage which is directly due to the existing subsidence must be assessed now once for all, and cannot be made the subject of piecemeal claims. For example, if there is good reason for holding that the subsidence has so damaged the plaintiffs' buildings on their land that these buildings will hereafter shew more injury than at present appears, then that liability must be claimed for now or not at all, and cannot be made the subject of a separate claim hereafter, when that

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further injury is developed. And I have no doubt that there would be a good claim for present damage based on the fact of the effect of the existing subsidence to which I have above referred. Again, if a subsidence were continuing, I think that might properly be a matter for consideration, though probably in such a case the landowner ought to wait before bringing his action until the subsidence is ended.

On the other hand, a head of damage from the existing subsidence, to be the subject of a good claim, must arise from that subsidence and not too remotely from it. And, with regard to the particular head of damage we have to consider in the present case, it is to be noticed that it is based entirely on the fear of further subsidences, and not on a continuation of the existing subsidence. The only connection it has with the existing subsidence is that that subsidence has revealed the existence of the defendants' workings, which may or may not give rise hereafter to other subsidences. Now, the defendants' working in themselves give rise to no right of action. It is only the damage caused by a subsidence arising from the workings that gives rise to a right of action. If, without any subsidence having occurred, the existence of the workings became known, and fear of a subsidence to arise therefrom arose and so caused a depreciation in the value of the land, the loss thereby occasioned to the owner of the land would form no cause of action and could not be recovered by him. And, further, even if some time afterwards a subsidence did occur, the owner of the land could not recover as damage caused by the subsidence the previous loss I have referred to. That loss could not be said to arise from the subsidence. It existed prior to the subsidence, and whether a subsidence occurred or not. Indeed, were it otherwise the subsidence might prove a blessing to the owner of the land, for but for it the loss which otherwise would have had to be borne by him would be recouped him, if he still remained owner of the land. And a further anomaly might ensue. Suppose the owner of the land at the time of the loss sold it to a purchaser at its diminished value, and then a subsidence occurred. The purchaser would then recover the loss though he had never suffered it. And if a loss, arising from fear of a subsidence on underground workings



becoming known prior to a subsidence, could not be recovered, how can it be right that the loss arising from fear of a possible second subsidence is recoverable merely because the existence of the workings giving rise to the fear is discovered by a first subsidence? It seems to me that inasmuch as fear of a future subsidence arising from a knowledge of the existence of the workings forms in itself no cause of action or claim for damage, it cannot be made a cause of action or claim for damage merely because the workings were discovered by a prior subsidence. Test it in this way. Suppose a small subsidence causing no loss or damage except such as may arise from discovery of the workings giving rise to a fear of another subsidence. Would that give rise to a cause of action and a valid claim? I think not. The fact is, when the matter is closely examined, that the diminution in value of an estate arising on a first subsidence from fear of a second subsidence is not really due, in a legal sense, to the first subsidence, but is due to the knowledge of the workings; and that knowledge might have been acquired by other means than the first subsidence. It was a mere accident that the first subsidence revealed the workings, which in fact existed whether the first subsidence occurred or not. There are other considerations which appear to me to support the view I am expressing. The fear of a second subsidence may be wholly unfounded. Ought it, then, to form the subject of a claim for damage? And if not, would it be relevant to go into evidence to shew that the fear is unfounded, or that the workings are such as to render a further subsidence impossible or improbable? It appears to me that a consideration of these questions and how they ought to be answered supports the view that loss in the value of the land arising from mere fear of a second subsidence is too remotely connected with the first subsidence to form good cause of a head of damage arising from that first subsidence. In the case of an action for a subsidence the cause of action, as I have pointed out, is not the defendant's workings but the subsidence caused by the workings. It appears to me that in such an action the defendant cannot be liable for damage based only on the fear (which may be groundless) that a further cause of action may subsequently arise.

It is said on behalf of the appellants that the measure of

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damage, in cases of the kind I am now considering, is the difference between the value of the property injured immediately prior to and immediately subsequent to the injury; and on this is based an argument in support of the appeal. But though, speaking generally, the damage may be measured in the way above mentioned, yet this proposition must be taken with the following qualification—namely, that the difference in value must flow from the injury directly, and not indirectly so as to be too remote. As Cotton L.J. stated in the case of *Rust v. Victoria Graving Dock Co.* (1): “Now one principle to be borne in mind is that damages can only be granted for injuries which are the direct result of the act of omission or commission complained of.” And in that case, accordingly, where the defendants had tortiously caused a flood to come on to the plaintiff’s lands and thereby damaged the plaintiff’s houses, and one result was to create a prejudice against the neighbourhood flooded, whereby the letting value of the houses was diminished, it was held that the loss thereby arising to the plaintiff could not be recovered from the defendants, inasmuch as that loss was not the natural result of or directly caused by the flood. I think the principle on which that case was decided applies to the present. The damage in that case was at least as closely connected with the flood as the damage claimed on this appeal is connected with the subsidence. But I can give an illustration very analogous to the present case, which will make clear what I have pointed out above, that the difference in value immediately prior and immediately subsequent to the injury, even though arising in a sense from the injury, may not be recoverable by way of damage for the injury. Suppose, prior to the subsidence, the plaintiffs’ lands had the reputation of having certain underground strata of value, and that the subsidence for the first time revealed the fact that the strata below the surface were of an inferior kind, and this revelation diminished the value of the lands. Although this loss in value arose, in one sense, from the subsidence, yet it appears to me that it could not be recovered from the defendants causing the subsidence by way of damage for their wrong. It would be too remote; and I cannot see how any satisfactory distinction can

be drawn between that case and the precise case we have to decide on this appeal.

For these reasons it appears to me that the decision of Swinfen Eady J. was right and should be affirmed; but as my brethren are of a different opinion, of course the appeal will be allowed.

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COZENS-HARDY L.J. I have had the opportunity of reading and considering the judgments of the Master of the Rolls and Romer L.J. I might be content with saying that I agree with the Master of the Rolls in thinking that this appeal must be allowed, and for the reasons set forth in his judgment; but having regard to the importance of the case I will add a few observations. In a case such as that with which we are concerned the true measure of damages is the difference in the selling value before and after the actionable wrong, except so far as that difference may be due to circumstances, such as the state of trade, not connected with the wrong. And when once the actionable wrong exists, or, in other words, when once subsidence attributable to the workings of the defendants exists, it is not easy to see on what ground the wrong-doer can escape from the liability to pay a full indemnity. The surface owner necessarily suffers two heads of damages—namely, first, structural damages, measured by the cost of repairs; and, secondly, diminution in the value of his property, even when fully repaired, by reason of the risk of future subsidence. Unless the wrong-doer is now liable in respect of this second head the surface owner can never recover it, and he will be without any remedy. I shrink from this conclusion. It is argued that in the event of a second subsidence the surface owner will then be in a position to recover the actual damage, and that it cannot be right to give him now what may be regarded as the present value of that future damage. But I think there is a fallacy in the argument. The starting point in the event of a second subsidence will not be the value before the first subsidence, but only the reduced value after the first subsidence.

In short, it seems to me that the second head of damages is so inseparable from the wrong, and flows so inevitably from it,

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Solicitors: *Patersons, Snow, Bloxam & Kinder, for Wilson,  
Wright & Wilsons, Manchester; Fowler & Co., for Grundy, Lamb  
& Grundy, Manchester.*

H. B. H.

C. A. AUTOMATIC SELF-CLEANSING FILTER SYNDICATE  
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[1906 A. 143.]

Feb. 23.

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March 22.

*Company—Directors—Powers—Vesting of Management in Directors—Resolution  
by a simple Majority of Shareholders for Sale of Undertaking—Refusal of  
Directors to comply with Resolution.*

A company had power under its memorandum of association to sell its undertaking to another company having similar objects, and by its articles of association the general management and control of the company were vested in the directors, subject to such regulations as might from time to time be made by extraordinary resolution, and, in particular, the directors were empowered to sell or otherwise deal with any property of the company on such terms as they might think fit. At a general meeting of the company a resolution was passed by a simple majority of the shareholders for the sale of the company's assets on certain terms to a new company formed for the purpose of acquiring them, and directing the directors to carry the sale into effect. The directors, being of opinion that a sale on those terms was not for the benefit of the company, declined to carry the sale into effect:—

*Held* (affirming the decision of Warrington J.), upon the construction of the articles, that the directors could not be compelled to comply with the resolution.

#### MOTION.

The Automatic Self-Cleansing Filter Syndicate Company, Limited, was incorporated on June 10, 1896. The original capital of the company was 700*l.*, divided into 700 shares of 1*l.* each; but the capital had since been increased, and there had now been issued 2700 shares of 1*l.* each.

The objects of the company, as stated in clause 3 of its memorandum of association, were (inter alia): (a) To acquire from



James Wilson the benefit of certain existing inventions in relation to the filtration, treatment, purification, storage, application, distribution, and use of liquids; and (*k*) to sell the undertaking of the company, or any part thereof, for such consideration as the company might deem fit, and in particular, for shares, debentures, or securities of any other company having objects altogether or in part similar to those of this company.

The articles provided as follows:—

“81. The company may by special resolution remove any director before the expiration of his period of office and appoint another qualified person in his stead. . . .”

“96. The management of the business and the control of the company shall be vested in the directors, who, in addition to the powers and authorities by these presents expressly conferred upon them, may exercise all such powers and do all such acts and things as may be exercised or done by the company, and are not hereby or by statute expressly directed or required to be exercised or done by the company in general meeting; but subject nevertheless to the provisions of the statutes and of these presents, and to such regulations, not being inconsistent with these presents, as may from time to time be made by extraordinary resolution,” but no regulation shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

“97. Without prejudice to the general powers conferred by the last preceding clause, and to the other powers and authorities conferred as aforesaid, it is hereby expressly declared that the directors shall be entrusted with the following powers, namely, power—

“(1.) To purchase or otherwise acquire for the company any property, letters patent, rights or privileges which the company is authorized to acquire, at such price, and generally on such terms and conditions, as they think fit; also to sell, lease, abandon, or otherwise deal with, any property, rights, or privileges to which the company may be entitled, on such terms and conditions as they may think fit.”

“(16.) To enter into all such negotiations and contracts and rescind and vary all such contracts, and execute and do all such

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acts, deeds, and things in the name or on behalf of the company as they might consider expedient for or in relation to any of the matters aforesaid, or otherwise for the purposes of the company."

The plaintiff A. H. McDiarmid, who was the holder of 1202 shares in the plaintiff company, being desirous that the assets and undertaking of the plaintiff company should be sold, arranged terms on behalf of the company for the sale of them to a new company formed for the purpose of acquiring them, and had these terms embodied in a contract which was engrossed ready for execution by the company.

On January 2, 1906, a meeting of the shareholders of the company, convened by the directors in accordance with a requisition signed by the plaintiff McDiarmid and other shareholders in the company, was held for the purpose of considering and if thought fit passing the following resolution:—

"That the company do sell the assets specified in the contract which has been produced to the meeting at the price and on the terms therein mentioned and contained and that the directors be and they are hereby directed to cause the common seal of the company to be affixed thereto within seven days and to carry the same into effect."

The meeting was adjourned until January 16, when the resolution was passed by a majority of 304 votes, 1502 votes for and 1198 votes against it. Practically the whole of the 1502 votes were given in respect of shares held by the plaintiff McDiarmid or his friends.

The directors, being of opinion that it would not be in the interests of the plaintiff company that the contract should be carried out, declined to comply with the resolution.

This was a motion by the plaintiff company and by the plaintiff McDiarmid, suing on behalf of himself and all other shareholders in the company, against the directors asking that the defendants might be ordered forthwith to affix the seal of the plaintiff company to the contract and to carry it into effect; that the defendants might be restrained by injunction until judgment or further order from dealing with or disposing of the assets of the plaintiff company intended to be comprised in the said agreement

in any manner inconsistent with the terms thereof; and for the appointment of a receiver of the said assets.

The motion was heard before Warrington J. on February 23, 1906.

*Cave, K.C.*, and *A. H. Jessel*, for the plaintiffs. The directors are the agents of the company, and as such are bound to obey the directions of their principal, the company. The plaintiffs merely desire that the directors shall do what the company in general meeting has ordered them to do.

[WARRINGTON J. Why not remove the directors?]

That would require a three-fourths majority. The company in general meeting has power to direct and control the directors in the management of the affairs of the company: *Isle of Wight Ry. Co. v. Tahourdin*. (1)

[WARRINGTON J. The company has by article 96 delegated the management of its business to the directors.]

The company can revoke that delegation.

[WARRINGTON J. The article can only be altered by a special resolution.]

[*Norton, K.C.*, referred to *Grant v. United Kingdom Switch-back Railways Co.* (2), and *Buckley on Companies*, 8th ed. p. 557.]

The articles are subject to the general rule that agents must obey the directions of their principal.

[WARRINGTON J. If you are right in your contention a simple majority of the shareholders might control the company.]

A company does not part with its powers by delegating them to its directors. The Court will not force upon a company a policy of which it does not approve: *Bainbridge v. Smith*. (3)

*Norton, K.C.*, and *L. Mossop*, for the directors, were not called upon.

WARRINGTON J. stated the facts, and continued:—The question I have to determine in this case is whether the shareholders of a company have power by a resolution passed by a simple majority

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(1) (1883) 25 Ch. D. 320.

(2) (1888) 40 Ch. D. 135.

(3) (1889) 41 Ch. D. 462.

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of their number to order the directors to seal an agreement for the sale of the whole of the assets of the company notwithstanding that the directors may think that the sale is improvident, and that the terms on which it is to be carried out are not fit terms on which the company ought to carry out such a sale. To my mind this question depends upon the true construction of the articles. The only articles which are material are articles 96 and 97. [His Lordship read the articles, and continued :—]

The effect of this resolution, if acted upon, would be to compel the directors to sell the whole of the assets of the company, not on such terms and conditions as they think fit, but upon such terms and conditions as a simple majority of the shareholders think fit. But it does not rest there. Article 96 provides that the management of the business and control of the company are to be vested in the directors. Now that article, which is for the protection of a minority of the shareholders, can only be altered by a special resolution, that is to say, by a resolution passed by a three-fourths majority, at a meeting called for the purpose, and confirmed at a subsequent meeting. If that provision could be revoked by a resolution of the shareholders passed by a simple majority, I can see no reason for the provision which is to be found in article 81 that the directors can only be removed by a special resolution. It seems to me that if a majority of the shareholders can, on a matter which is vested in the directors, overrule the discretion of the directors, there might just as well be no provision at all in the articles as to the removal of the directors by special resolution. Moreover, pressed to its logical conclusion, the result would be that when a majority of the shareholders disagree with the policy of the directors, though they cannot remove the directors except by special resolution, they might carry on the whole of the business of the company as they pleased, and thus, though not able to remove the directors, overrule every act which the board might otherwise do. It seems to me on the true construction of these articles that the management of the business and the control of the company are vested in the directors, and consequently that the control of the company as to any particular matter, or the management of any particular transaction or any particular part of



the business of the company, can only be removed from the board by an alteration of the articles, such alteration, of course, requiring a special resolution.

No case has been cited to me which, in my opinion, has really any bearing on this question, which depends on the construction of the articles. In *Isle of Wight Ry. Co. v. Tahourdin* (1), which was a case under the Companies Clauses Consolidation Act, 1845, it was pointed out by the Court of Appeal that the resolution which it was proposed to submit to the meeting, and upon which the question arose, was one which could be carried by a simple majority of the company. Moreover, all that was there decided was that the Court would not interfere to prevent a meeting of shareholders being held. No decision was given as to what would be the result with reference to the validity of any resolution which might be passed at the meeting.

On the whole, it seems to me that the resolution which was passed at the general meeting on January 16, 1906, is not one which the directors are bound to carry into effect. The consequence is, I must refuse the motion, with the usual result—that is to say, the costs will be the defendants' costs in the action.

W. I. C.

The plaintiffs appealed. The appeal was heard on March 22, 1906.

*Gore-Browne, K.C.*, and *A. H. Jessel*, for the plaintiffs. The question is whether a company in general meeting has power to direct the course of action to be pursued by the directors or whether the directors can refuse to do what the company in general meeting directs them to do. The company is the principal or employer; the directors are agents or servants. Every principal or employer has a right to the obedience of his agents or servants in the case of all lawful commands. In the case of a company there is a great difficulty in making its wishes known, and directors are properly allowed a free hand; but when it does make known its wishes the directors must obey, in the absence of fraud and oppression, such as occurred in *Menier v.*

(1) 25 Ch. D. 320.

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*Hooper's Telegraph Works.* (1) Articles 96 and 97 cannot mean that the company is precluded from doing any of those things which are entrusted to the directors—that the company is to lose its right of controlling its own business beyond declaring a dividend and appointing a managing director. No case can be found in which directors have come to the Court and asserted the right to disobey the orders of the company. Even where the articles nominate a particular man managing director without giving any power to remove him, the Court will not compel the company to continue to employ him after the company has expressed its desire in general meeting: *Bainbridge v. Smith* (2); and see *Browne v. La Trinidad*. (3) That a company has powers concurrently with its directors in matters entrusted to them by the articles is shewn by *Grant v. United Kingdom Switchback Railways Co.* (4) *Isle of Wight Ry. Co. v. Tahourdin* (5) also supports the plaintiffs' contention. That was the converse of this case. There the Court refused to prevent a company from calling a meeting for the purpose of interfering with the course taken by the directors in a matter within their powers where the shareholders thought that that course was not for the benefit of the company.

[COZENS-HARDY L.J. That was a decision under the Companies Clauses Consolidation Act, 1845, which contains a provision subordinating the directors to the company. Is it not curious that Table A should not reproduce that?]

It must have been implied. If it is sought to make the master the servant and the servant master, that ought to be done by express words.

*Norton, K.C.*, and *L. Mossop*, for the defendants. This case is really analogous to the case of a partnership where, by the articles, one partner is appointed to manage the business. By these articles the directors are to have the control of the company's business, and that control is not to be interfered with except by extraordinary resolution. *Grant v. United Kingdom Switchback Railways Co.* (4) is really an authority in

(1) (1874) L. R. 9 Ch. 350.

(3) (1887) 37 Ch. D. 1, 13.

(2) 41 Ch. D. 462, 474.

(4) 40 Ch. D. 135.

(5) 25 Ch. D. 320, 329.

favour of the defendants. It was there held that a company could by a mere ordinary resolution affirm a contract made by the directors without authority because that was not an alteration of the articles, but could not give the directors power to do things in future which the articles did not authorize because that would be an alteration of the articles, which, in that case, required a special resolution. So here it is an alteration of the articles to tell the directors that they are to obey the behests of the company made by a simple resolution in general meeting. That is contrary to the express terms of article 96. [They also referred to *North-West Transportation Co. v. Beatty*. (1)]

*Gore-Browne, K.C.*, in reply.

**COLLINS M.R.** This is an appeal from a decision of Warrington J., who has been asked by the plaintiffs, Mr. McDiarmid and the company, for a declaration that the defendants, as directors of the company, are bound to carry into effect a resolution passed at a meeting of the shareholders in the company on January 16. There are a number of other incidental reliefs asked—for instance, that they be ordered to affix the seal of the company, and that they may be restrained by injunction from dealing with the assets of the company in any manner inconsistent with the agreement.

The point arises in this way. At a meeting of the company a resolution was passed by a majority—I was going to say a bare majority, but it was a majority—in favour of a sale to a purchaser, and the directors, honestly believing, as Warrington J. thought, that it was most undesirable in the interests of the company that that agreement should be carried into effect, refused to affix the seal of the company to it, or to assist in carrying out a resolution which they disapproved of; and the question is whether under the memorandum and articles of association here the directors are bound to accept, in substitution of their own view, the views contained in the resolution of the company. Warrington J. held that the majority could not impose that obligation upon the directors, and that on the true construction of the articles the directors were the persons

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authorized by the articles to effect this sale, and that unless the other powers given by the memorandum were invoked by a special resolution, it was impossible for a mere majority at a meeting to override the views of the directors. That depends, as Warrington J. put it, upon the construction of the articles. First of all there is no doubt that the company under its memorandum has the power in clause 3 (*k*) to sell the undertaking of the company or any part thereof. In this case there is some small exception, I believe, to that which is to be sold, but I do not think that that becomes material. We now come to clause 81 of the articles, which I think it is important to refer to in this connection. [His Lordship read the clause.] Then come the two clauses which are most material, 96 and 97, whereby the powers of the directors are defined. [His Lordship read clause 96 and clause 97 (1).] Therefore in the matters referred to in article 97 (1.) the view of the directors as to the fitness of the matter is made the standard; and furthermore, by article 96 they are given in express terms the full powers which the company has, except so far as they "are not hereby or by statute expressly directed or required to be exercised or done by the company," so that the directors have absolute power to do all things other than those that are expressly required to be done by the company; and then comes the limitation on their general authority—"subject to such regulations as may from time to time be made by extraordinary resolution." Therefore, if it is desired to alter the powers of the directors that must be done, not by a resolution carried by a majority at an ordinary meeting of the company, but by an extraordinary resolution. In these circumstances it seems to me that it is not competent for the majority of the shareholders at an ordinary meeting to affect or alter the mandate originally given to the directors, by the articles of association. It has been suggested that this is a mere question of principal and agent, and that it would be an absurd thing if a principal in appointing an agent should in effect appoint a dictator who is to manage him instead of his managing the agent. I think that that analogy does not strictly apply to this case. No doubt for some purposes directors are agents. For whom are they agents? You have, no doubt, in theory and law



one entity, the company, which might be a principal, but you have to go behind that when you look to the particular position of directors. It is by the consensus of all the individuals in the company that these directors become agents and hold their rights as agents. It is not fair to say that a majority at a meeting is for the purposes of this case the principal so as to alter the mandate of the agent. The minority also must be taken into account. There are provisions by which the minority may be over-borne, but that can only be done by special machinery in the shape of special resolutions. Short of that the mandate which must be obeyed is not that of the majority—it is that of the whole entity made up of all the shareholders. If the mandate of the directors is to be altered, it can only be under the machinery of the memorandum and articles themselves. I do not think I need say more.

One argument used by Warrington J. strongly supports that view. He says in effect: “There is to be found in these articles a provision that a director can only be removed by special resolution. What is the use of that provision if the views of the directors can be overridden by a mere majority at an ordinary meeting? Practically you do not want any special power to remove directors if you can do without them and differ from their opinion and compel something other than their view to be carried into effect.” That argument appears to me to confirm the view taken by the learned judge.

The cases cited do not really apply. Indeed, I do not think that Mr. Gore-Browne, who argued this case with his usual ability and fairness, looked upon them as more than presenting some analogy, and the only case which, at first sight, appeared to me at all near this case was *Isle of Wight Ry. Co. v. Tahourdin* (1); but when that is looked into, as was pointed out by Cozens-Hardy L.J., it rests upon a different statute, a statute differing in the most essential point, namely, in the limitation of the directors’ authority. Therefore that case has no direct bearing on the case before us, and on these grounds, which in substance are the same grounds as those of the learned judge below, I am of opinion that this appeal fails.

(1) 25 Ch. D. 320.

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COZENS-HARDY L.J. I am of the same opinion. It is somewhat remarkable that in the year 1906 this interesting and important question of company law should for the first time arise for decision, and it is perhaps necessary to go back to the root principle which governs these cases under the Companies Act, 1862. It has been decided that the articles of association are a contract between the members of the company inter se. That was settled finally by the case of *Browne v. La Trinidad* (1), if it was not settled before. We must therefore consider what is the relevant contract which these shareholders have entered into, and that contract, of course, is to be found in the memorandum and articles. I will not again read articles 96 and 97, but it seems to me that the shareholders have by their express contract mutually stipulated that their common affairs should be managed by certain directors to be appointed by the shareholders in the manner described by other articles, such directors being liable to be removed only by special resolution. If you once get a stipulation of that kind in a contract made between the parties, what right is there to interfere with the contract, apart, of course, from any misconduct on the part of the directors? There is no such misconduct in the present case. Is there any analogy which supports the case of the plaintiffs? I think not. It seems to me the analogy is all the other way. Take the case of an ordinary partnership. If in an ordinary partnership there is a stipulation in the partnership deed that the partnership business shall be managed by one of the partners, it would be plain that in the absence of misconduct, or in the absence of circumstances involving the total dissolution of the partnership, the majority of the partners would have no right to apply to the Court to restrain him or to interfere with the management of the partnership business. I would refer to what is said in Lindley on Partnership, 7th ed. p. 574: "Where, however, the partner complained of has by agreement been constituted the active managing partner, the Court will not interfere with him unless a strong case be made out against him"—that is to say, unless there is some case of fraud or misconduct to justify the interference of the Court. Nor is this doctrine limited to

(1) 37 Ch. D. 1.

a case of co-partners. It is not a peculiar incident of co-partnership: it applies equally to cases of co-ownership. I think in some of the earlier cases before Lord Eldon (1) with reference to the co-owners of one of the theatres, he laid down the principle that when the co-owners had appointed a particular member as manager the Court would not, except in the case of misconduct, interfere with him. And why? Because it is a fallacy to say that the relation is that of simple principal and agent. The person who is managing is managing for himself as well as for the others. It is not in the least a case where you have a master on the one side and a mere servant on the other. You are dealing here, as in the case of a partnership, with parties having individual rights as to which there are mutual stipulations for their common benefit, and when you once get that, it seems to me that there is no ground for saying that the mere majority can put an end to the express stipulations contained in the bargain which they have made. Still less can that be so when you find in the contract itself provisions which shew an intention that the powers conferred upon the directors can only be varied by extraordinary resolution, that is to say, by a three-fourths majority at one meeting, and that the directors themselves when appointed shall only be removed by special resolution, that is to say, by three-fourths majority at one meeting and a simple majority at a confirmatory meeting. That being so, if you once get clear of the view that the directors are mere agents of the company, I cannot see anything in principle to justify the contention that the directors are bound to comply with the votes or the resolutions of a simple majority at an ordinary meeting of the shareholders. I do not think it true to say that the directors are agents. I think it is more nearly true to say that they are in the position of managing partners appointed to fill that post by a mutual arrangement between all the shareholders. So much for principle. On principle I agree entirely with what the Master of the Rolls has said, agreeing as he does with the conclusions of Warrington J.

When we come to the authorities there is, I think, nothing even approaching to an authority in favour of the appellants'

(1) See *Waters v. Taylor*, (1808) 15 Ves. 10; (1813) 2 V. & B. 299.

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case. *Isle of Wight Ry. Co. v. Tahourdin* (1) at the utmost contained a dictum which at first sight looked in favour of appellants; but, treating it as an authority, it was an authority upon an Act which differed in a vital point from the Act which we are now considering, because although by s. 90 of the Companies Clauses Act the directors have powers of management and superintendence very similar to those found in Table A, article 55, and in articles 96 and 97, that section contains these vital words: "And the exercise of all such powers shall be subject also to the control and regulation of any general meeting specially convened for the purpose." If those words had been found in the present Act of Parliament the appellants' case would have been comparatively clear. I see no ground for reading them into the Companies Act, 1862, or into the memorandum and articles of association of this company. For these reasons I think that the appeal must be dismissed.

Solicitors: *McDiarmid & Son; H. Mossop.*

(1) 25 Ch. D. 320.

H. B. H.



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*Land Transfer—Mortgage or Charge—Registration—“Registered Proprietor”  
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Locus standi—Land Transfer Act, 1875 (38 & 39 Vict. c. 87)—Land  
Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 7.*

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C., the registered proprietor under the Land Transfer Acts, 1875 and 1897, of a charge on registered land in Middlesex, purported to transfer the charge by deed for value to O., who thereupon left the transfer at the Land Registry for registration, and he was accordingly registered as proprietor of the charge. It was afterwards discovered that the transfer was a forgery by C.'s solicitor. There had been no negligence on the part of C., and O. was perfectly honest in the transaction. On the discovery of the fraud C. obtained from Kekewich J. an order to rectify the register by removing O.'s name and restoring that of C. O. then applied to the registrar for indemnity under s. 7 of the Land Transfer Act, 1897, and the registrar made an award in his favour, which was confirmed by Kekewich J.

On appeal by the Crown from Kekewich J.'s decision:—

*Held*, that O. was not entitled to indemnity, on the grounds (1.) that upon the principle laid down in *Sheffield Corporation v. Barclay* ([1905] A. C. 392, 399, 403)—a decision of the House of Lords subsequent in date to that of Kekewich J.—O., by bringing the transfer to the registrar and requesting him to register it, had affirmed and warranted it to be a genuine document, and that by that act on his part (although innocent) he had directly brought about the registration of the charge in his name, and so “caused or contributed to the loss,” within s. 7, sub-s. 3, of the Act of 1897; and (2.) that O. had not in fact any transfer, under s. 40 of the Act of 1875, from “the registered proprietor of the charge,” and consequently had not “suffered loss by the rectification,” within s. 7, sub-s. 4, of the Act of 1897.

But, *per* Stirling L.J., *quære*, whether O. did not, by the removal of his name from the register, lose the benefits which are conferred on the registered proprietor for the time being of a charge by ss. 23—27 of the Act of 1875, and thus become entitled to some compensation.

*Per* Vaughan Williams L.J.: The act of the registrar in putting the name of a transferee of a charge on the register is a mere ministerial act in the performance of a ministerial duty. It confers on the transferee no estate or right which he had not before registration. The utmost it confers on him is the capacity to transfer to a

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purchaser for valuable consideration unaware of any irregularity in the transaction.

*Per Cozens-Hardy L.J.* : In the case of the registration of the transfer of a charge under s. 40 of the Act of 1875, no person, other than the person first registered, can claim any beneficial right or interest from the mere fact of being on the register unless he can also prove that he has a transfer from some person previously on the register, and in that sense has relied upon the register.

The position, duties and liabilities of the registrar under the Land Transfer Acts considered.

*Per Kekewich J.* : By s. 7, sub-s. 5, of the Land Transfer Act, 1897, the registrar under that and the principal Act is placed in a judicial position as regards his power to award indemnity to a person suffering loss by a rectification of the register, and is not in the position of a mere arbitrator; and therefore an appeal from his award will lie to the High Court either by the Crown or by the applicant for indemnity.

The registrar being thus in a judicial position, the proper practice appears to be that, upon the hearing of any application to him for indemnity, both the applicant and the Crown should be made parties to the proceedings and be represented before him.

#### APPEAL from Kekewich J.

On December 7, 1901, a Mrs. Connell was registered under the Land Transfer Acts, 1875 and 1897 (38 & 39 Vict. c. 87 and 60 & 61 Vict. c. 65), as the proprietor of a charge on registered land at Notting Hill, Middlesex, for 350*l.* On February 23, 1903, Mrs. Connell's solicitor, William Alexander Thomson, produced to Edgar Thomas Odell what purported to be an instrument of transfer (executed by Mrs. Connell and witnessed by Thomson) of the charge, upon which 300*l.* was then owing, from Mrs. Connell to Odell, together with a written authority, purporting to be signed by Mrs. Connell, to receive the money. Odell paid the 300*l.* to Thomson and left the transfer at the office of the Land Registry for registration, and he was registered accordingly as proprietor of the charge. It was subsequently discovered that the instrument of transfer and the authority had been forged by Thomson, who was eventually convicted. There had been no negligence on the part of Mrs. Connell, and it was admitted that Odell had acted with perfect honesty throughout the transaction.

On June 25, 1904, upon Mrs. Connell's application, an order was made by Kekewich J. declaring that the register ought to be rectified by removing the name of Odell in order that the name of Mrs. Connell might be restored as proprietor of the

charge, and directing that the proper officer should rectify the register accordingly; and the rectification was duly effected. Odell then applied to the registrar for an indemnity under s. 7, sub-s. 4, of the Land Transfer Act, 1897, and the registrar made an award in his favour, with costs. A summons by way of appeal from that award was then taken out in the Land Registry by the Attorney-General on behalf of the Assistant Paymaster-General for Supreme Court Business and the Comptroller-General of the National Debt Office, being the official trustees in whom the indemnity or insurance fund constituted under the Land Transfer Act, 1897, was vested.

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The summons originally came on for hearing before Kekewich J. on February 6, 1905, when it was adjourned for further inquiry as to the facts. It came on for hearing again on April 17, 1905, but upon its being opened by the applicant, the Attorney-General, the preliminary objection was taken on behalf of the respondent Odell that under the Land Transfer Act, 1897, the Attorney-General had no locus standi, it being contended that the right of appeal from an award of indemnity made by the registrar was, by sub-s. 5 of s. 7 of the Act, given only to the "applicant" for the indemnity. The sections of the Land Transfer Acts, 1875 and 1897 (38 & 39 Vict. c. 87 and 60 & 61 Vict. c. 65), mainly referred to in the course of the arguments on the preliminary objection and on the merits will be found in the note at the end of this report. (1)

On the preliminary objection,

*P. O. Lawrence, K.C.*, and *Baden Fuller*, for the respondent Odell.

*Sir R. B. Finlay, A.-G.*, and *R. J. Parker*, for the applicant, the Attorney-General.

KEKEWICH J. It seems to me that a decision in favour of the preliminary objection would be against all principle, and I am bound to consider that the Act of 1897, and of course the Act of 1875 also, were intended by the Legislature to be construed according to the ordinary principles which govern such matters.

(1) Post, p. 83.



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But before coming to that I notice one argument of Mr. Lawrence which I do not think goes very far, but still it was the substratum of his remarks, namely, that the registrar is appointed by s. 108 of the Act of 1875 expressly to conduct the whole business of registering land, and that large powers are given to him for that purpose. That is perfectly true, but I do not understand that this power to award an indemnity is part of the business of the Registry, and I do not think that the registrar could be said to "conduct" this part of the business. In truth, when you see the powers given to him with reference to the indemnity, you see at once also that it is not the business which he is conducting. It is very important to observe that what he has to do is to determine something. He has to act in a judicial capacity. He has not merely to see that the transfers are properly registered, or to see that the machinery of the office proceeds in a proper manner, but he is created by these provisions a judge in a certain class of cases. The words "conducting the business" cannot properly be held to embrace the determination of this important question. The point seems to me to arise on something which is entirely outside the ordinary business of the office. Provision is made that a certain class of persons, of whom Mr. Odell may or may not be one—that is for me hereafter to decide—shall be entitled to an indemnity, and that indemnity is guaranteed by the Treasury. We need not consider now whether it is the insurance fund that has to pay or the Treasury that has to pay: a fund is created one way or another out of which an indemnity is to be paid.

Now the Act provides how you are to ascertain whether a person who applies for the benefit of that indemnity fund is entitled to it or not. By sub-s. 5 of s. 7 of the Act of 1897 it is enacted, "The registrar may, if the applicant desires it, and subject to an appeal to the Court, determine whether a right to indemnity has arisen under this section, and, if so, award indemnity." Reading those words alone, it is reasonably obvious that whatever the registrar does is subject to appeal to the Court. He is only a judge of first instance, from whom there may be an appeal, and it is only by reading the rest of the words, and from them raising an implication which I do not think can fairly be



raised, that you can destroy that construction and say that no one is to appeal but the applicant. The sub-section goes on: "In the event of an appeal to the Court, the applicant shall not be required to pay any costs except his own, even if unsuccessful, unless the Court shall consider that the appeal is unreasonable." Now from that it is argued with some plausibility that the applicant is the only possible appellant, because there is no provision for costs except the applicant's costs. There is some foundation for the argument, but I do not think that the implication arising from that sentence ought to be considered strong enough to get rid of the first provision that there is to be an appeal to the Court. If you once put the registrar into the judicial position, which I think he must be held to occupy, an appeal to the Court necessarily follows, unless indeed he is to sit as an arbitrator. It seems to me it cannot have been intended that he should sit as an arbitrator, and the word used, though I think not altogether inappropriate to an arbitration, is still not *the* appropriate word. He has to "determine" whether a right to indemnify has arisen, and, if so, to award the indemnity. He has not to award whether the right to indemnity has arisen, but he has to "determine" it, and that is the particular word which is used with regard to a judicial decision. A judge has to hear and "determine." Whether there is an appeal as regards the amount of the indemnity I am not now considering—I do not by any means say there is not—but, as regards the right to indemnity, to my mind it is clear that the registrar had only to determine it as a judge.

Then it is said that, if that is the right view, in every case where an indemnity is claimed there must be cited before the registrar either the Crown or the Attorney-General or the trustees of the insurance fund, it matters not which. It seems to me that that really is the consequence, and I am not by any means sure—this being the first case in which the question of indemnity has arisen—that the registrar would not have done better to insist on having the parties before him. He evidently did not think it necessary, but my present impression is that whenever cases of this kind arise it would be better for the registrar to say, "I have to determine; I am not the arbitrator.

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I must have someone to argue, not only in favour of the indemnity, but against it." If that is the necessary consequence it does not seem to me to be one to be very highly deprecated, because the Court which has to hear the appeal will then have the advantage of the case having been argued before the registrar. There remain two other short points. The first is, In whom is the right of appeal? It matters not, as it seems to me, whether it is in the Attorney-General on behalf of the Crown representing the Treasury or in the trustees of the fund. They really are the same persons for this purpose. They are the protectors of the fund. The trustees might possibly have been sufficient. They would have no doubt done their duty to protect the fund, and the Attorney-General would do the same except that the fund is not under the control of the Treasury in the first instance. It is under the control of the trustees, and therefore they are technically necessary parties. That being so, the better way, it seems to me, is to do that which has been done in this particular case, viz., to add the Attorney-General on behalf of the trustees as a party. The last point is whether the appellants are persons aggrieved. If my view is correct it is unnecessary to consider that point. I cannot conceive that they are not persons aggrieved, because the indemnity is to come out of the fund of which these trustees are trustees for all persons claiming indemnity, and the Treasury behind them is the guarantor of the indemnity fund. If the registrar has come to an improper decision, as it is said he has done in this case, and has ordered an indemnity to be paid where it ought not to be paid, then it follows that money is being taken out of the fund and may be possibly demanded from the Treasury which ought not to be taken or demanded. Surely a person, whoever it is, from whom money is taken or demanded under an order which ought not to have been made is a person aggrieved. I think that the appeal to the Court lies.

The summons was then heard on the merits.

*Sir R. B. Finlay, A.-G., and R. J. Parker, for the applicant, the Attorney-General.*

*P. O. Lawrence, K.C., and Baden Fuller, for the respondent Odell.*

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KEKEWICH J. The duty of the Court in the present case is confined to the construction of those provisions of the Land Transfer Act, 1897, which relate to the indemnity fund and the persons who are entitled to come upon that indemnity fund, and particularly the construction of s. 7 of the Act. It seems to me that the first impression to be derived from a study of that section is that the Legislature intended to provide an indemnity to all persons—with certain personal exceptions—who suffer loss by reason of fraud or mistake in the registration of transfers under the Act, and that impression is confirmed by a closer examination of the section viewed by the light of the arguments which have been addressed to the Court. Speaking generally, the section seems to be a carefully framed provision intended to embrace all the cases of loss under the circumstances I have mentioned.

The 1st sub-section clearly deals only with cases where no rectification was possible under the Act of 1875. That is not the case with which we are dealing here, and the only importance of that sub-section is to see that it falls into line in a well-arranged code, I was going to say, but a well-arranged schedule, of cases to which the provision for indemnity is intended to apply. Having got rid of those cases en bloc where there is no rectification possible under the principal Act, we come to sub-s. 2, which is not so simple or so easy to understand. That might perhaps, but for one consideration, grasp or include such a case as this which we have here, where there is a registered disposition which is absolutely void by reason of forgery and the register has to be rectified. But the answer to that is that this sub-section contains a direct provision that the register shall be rectified, and it seems logically to follow that this sub-section cannot be intended to apply to a case in which rectification was already possible. It is following on sub-s. 1, which deals with cases where rectification was not possible, and it goes on apparently to deal with the case where it has not been possible

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but shall now be possible; and to include in a provision of that kind a case in which rectification is already possible would seem to contradict the provision of the Act, or at any rate to construe it as applying to cases where there is no necessity for providing for rectification. That seems to be a sound comment on the sub-section and to shew that this case, which might otherwise fall within it, was not intended to fall within it. Sub-s. 3 is a proviso which must be looked at presently, but it is a proviso certainly on sub-s. 2, and possibly on some other of the sub-sections. Then we come to sub-s. 4, which is the only other sub-section specifying cases in which the provisions for indemnity are to apply. Now that passes on to a different case. We deal with cases under sub-s. 1 where rectification was not possible under the principal Act. We deal under sub-s. 2 with cases where it was intended now to apply the rule of rectification where rectification was not possible under the principal Act. Now in sub-s. 4 we deal with cases where the register could be rectified under the principal Act, and confessedly, looking at s. 98 of that Act, the case of an original grant—that is to say, where there has been no transfer by the grantee at all, either for value or voluntarily—does come within that clause. I do not pause to consider whether each case falls within the clause: that one particular case certainly does. This sub-section certainly embraces a case where the man who is coming for a claim on the indemnity fund was himself the transferee who has, according to his own view, which has to be examined, been aggrieved—or “suffered loss” is the proper phrase—by reason of what has occurred through a fraud or a mistake. There can be no question that he does fall within that, and to my mind there is no reason why, unless there is some proviso or exception to exclude him, he should not come on the indemnity fund if he once convinces the registrar that he has suffered loss by reason of fraud or mistake. There is one exception here which one must notice in the body of this sub-s. 4, viz., that he is not to have any indemnity if he was aware of, or could by the exercise of reasonable care have discovered, the fraud or mistake which induced the loss. It is put in the sub-section in a slightly different way, but I have expressed the meaning. That may on some future occasion



give rise to much discussion, because we might have an entirely different state of facts where a very serious question would arise whether the grantee was not aware, or could not by the exercise of reasonable care have discovered, that forgery or other fraud existed. There is no question about that here. It has not been argued that Mr. Odell did not act reasonably and adopt all reasonable care, and knowledge it is impossible to impute to him. Notice also could not be imputed, but I do not know that the words "was not aware of" do include notice in the equitable sense of the word. He therefore comes, as it seems to me, clearly within the sub-section according to the meaning of the words. But it does not follow that Mr. Odell is entitled to indemnity because he is only to be entitled "likewise"—that is to say, in the same way as others, which, I think, must mean also subject to the same liabilities—and he must suffer, as others do, loss by rectification. I have to consider whether he has suffered loss by the rectification, and whether by reason of the "likewise" or by reason of the "otherwise" in the application of sub-s. 3 he is otherwise debarred from claiming the indemnity if he is entitled to it. Now we have throughout these sub-sections a reference to loss by rectification. We find it in sub-s. 2, "The register shall be rectified, and the person suffering loss by the rectification shall be entitled to the indemnity"; and in sub-s. 4 we have "the person suffering loss by the rectification." Now has Mr. Odell suffered loss by the rectification? He has certainly suffered loss. He paid for a transfer of a registered charge. It was transferred to him; it has been vacated; the register has been rectified; his money is gone, and he is no longer the proprietor of that charge. In connection with his defence of his rights he has incurred certain costs, so that there is no question he has suffered loss. But has he suffered it by the rectification? Now the first argument against him is this: The loss, it is said, was occasioned by the forgery—that is to say, by there being in existence a deed purporting to be executed by Mrs. Connell, the registered proprietor of the charge, but not in fact executed by her. His property was gone—or, rather, he never had any property at all, that is the more proper view. When he advanced this money and accepted what he thought to be a transfer of the

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 1905 been registered. There was no deed as between him and Mrs.  
 ATTORNEY- Connell at all, and therefore what occasioned the loss was the  
 GENERAL forged deed, and not the rectification of the register when the  
 v. fraud was discovered. Then, further, it was urged that, having  
 ODELL. got on the register, he could not have transferred to anyone else  
 Kekewich J. as soon as he discovered the forgery. He might possibly have  
 done it before the discovery, and there was an interval during  
 which he was in the position of registered owner of the charge  
 with power as registered owner to transfer, and possibly to make  
 a title to a third person; but he got something with which he  
 could not deal, because it really had no existence. Therefore  
 again, it is said, he has not suffered loss by the rectification.  
 He has suffered loss by unfortunately paying for and holding  
 something with which he could not deal, and which was not  
 valuable in his hands. That is the argument on that part of  
 the case. Now it seems to me that that is giving too narrow a  
 construction to the words "by the rectification." As long as  
 Mr. Odell is on the register, at any rate he is the registered  
 proprietor of the charge, and he has lost that status by the  
 rectification. The rectification is the proximate cause of the  
 loss, although no doubt the original cause was the forgery. In  
 my judgment the rectification was the cause of the loss within  
 the meaning of the Act. If that be so I have to consider  
 whether Mr. Odell is debarred from claiming indemnity by  
 reason of his having caused or substantially contributed to  
 the loss by his act, neglect, or default. I am applying the  
 provisions of sub-s. 3 to those of sub-s. 4 and construing them  
 as a whole. I think that they ought to be so applied. There is a  
 little difficulty in the way of that construction, not because of the  
 position of those provisions, although they seem to be a little out  
 of order, but because sub-s. 4 has its own restrictions on the claim  
 of the grantee, who must not have been aware of or able by the  
 exercise of reasonable care to discover the fraud or mistake. It does  
 seem a little strange that, notwithstanding that special provision  
 there, the grantee should be affected by the provisions of sub-s. 3.  
 Still I think it is general in its terms. Moreover, although it is  
 a mere verbal argument, the word "likewise" at the end of

sub-s. 4, while it certainly means that the persons suffering shall be entitled to the indemnity in the same way as others are entitled to it, must mean also subject to the same restrictions. Now, has Mr. Odell caused or substantially contributed by his act, neglect, or default? There is one thing only that Mr. Odell has done, and that is, having acquired the charge, he carried in, either personally or by his solicitor, the transfer of the charge for registration and demanded registration. Has he thereby substantially contributed to the loss by his act? In one sense he certainly has, because if he had not carried in the transfer the registrar would not have been called on to register the transfer of charge, Mr. Odell would never have obtained any apparent rights under it, and when Mrs. Connell came to claim her own she would have found her own unaffected by any transfer by a document purporting to be executed by her. So, even after he had taken it in for registration and given due notice of it, he might even then not have insisted on its being registered, but of course he did. In that sense, therefore, he has contributed to the loss by his act. Now is that an act which is contemplated in this sub-section as depriving a man of that which otherwise he would be entitled to, in my view, namely, indemnity for the loss he has suffered? I cannot think that it is. The act spoken of in the sub-section must mean something independently of completing the transfer. The only person who can claim indemnity or the only person who can have suffered loss—at any rate in such a case as we have to deal with—is the transferee or grantee, and he must in order to put himself in a position to claim the indemnity have put himself on the register, and must, being on the register, have had his name taken off the register. The register as well must have been rectified, or otherwise no claim to indemnity would have accrued. It seems to me impossible to suppose the Legislature could have intended that merely requiring the registrar to perform his ministerial office of entering on the register this transfer of charge can be an act which substantially contributed to the loss. There I think those cases which have been cited about the registration of shares in companies, and particularly the case of *Sheffield Corporation v. Barclay* (1), are

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useful. They do enable one to see that such an act as is there mentioned must mean something like a voluntary act on the part of the person making the claim, something outside the mere transaction of procuring the registration. It is not necessary to consider what would do it, because, generally speaking, what is intended is that the man shall not claim if really he has induced the result in respect of which now he claims indemnity. He does nothing of that kind here. All he has done is innocently to purchase a transfer of a charge and then, having purchased it, to treat in the regular manner. In my opinion this case falls within the Act.

C. A. From that decision the Attorney-General appealed to the Court of Appeal.

The appeal was heard on December 7 and 8, 1905.

*Sir R. B. Finlay, A.-G., and R. J. Parker*, for the appellant. It is contended that the entry of Odell on the register was really caused by his bringing in the forged transfer for registration. Odell was damnified, not by the registration or by the removal of his name, but by the taking in of the forged transfer for registration. He is not, therefore, entitled to compensation under s. 7 of the Land Transfer Act, 1897. *Sheffield Corporation v. Barclay* (1) and *Simm v. Anglo-American Telegraph Co.* (2) shew that the person who brings a transfer to a company or corporation for registration thereby represents to them that the transfer is genuine, and enters into an implied contract that, if the transfer is a forgery and the company or corporation suffer loss by reason of the registration, he will indemnify them. Those cases apply here. Therefore s. 7 of the Land Transfer Act, 1897, does not entitle Odell to compensation. It is submitted that the word "grantee" in sub-s. 4 cannot mean the first grantee; it must apply to subsequent grantees. The first grantee cannot be injured by the rectification of the register; the injury to him arises from the defective title which he had. If the decision of Kekewich J. is right, the result must be that the genuineness of all transfers brought in for registration will be guaranteed by the public

(1) [1905] A. C. 392.

(2) (1879) 5 Q. B. D. 188.



credit if the indemnity fund should be insufficient. *Sheffield Corporation v. Barclay* (1), a decision of the House of Lords subsequent to that of Kekewich J., in principle governs the present case. The registration was directly brought about by the lodging of the forged transfer by Odell's solicitor. It was the act of Odell, by his solicitor, that caused or substantially contributed to the loss. It is submitted (1.) that Odell does not come within the words of the indemnity clause; (2.) that his act substantially contributed to the loss; and (3.) that no loss was caused to him by the rectification of the register. The person who tenders an instrument for registration has the best means of discovering whether it is genuine. He does not rely upon the registration; he pays his money before the registration.

[COZENS-HARDY L.J. If you are right, to what case can s. 7 apply?]

A bona fide grantee for value from Odell, the fraud being discovered before registration, would be within the section: see s. 49 of the Land Transfer Act, 1875; *Capital and Counties Bank v. Rhodes*. (2)

[COZENS-HARDY L.J. Is not an unregistered alienee within the section?]

It is not contended that he is not, but the judgment of Kekewich J. seems to imply that he is not. Sect. 40 of the Land Transfer Act, 1875, as amended by Sched. I. to the Land Transfer Act, 1897, deals with the transfer of charges. There was neglect on the part of Odell's solicitor. He never saw Mrs. Connell, and took no steps to check her solicitor, Thomson, but paid the money to him on an authority which purported to be signed by her, he being also the witness to the transfer deed. Sect. 7 was intended to indemnify against loss occasioned by entry upon or removal from the register, not against all loss occasioned by fraud. A sub-grantee from Odell would suffer loss by reason of his having relied upon the registration of Odell and by the rectification of the register by the removal of his name. Odell took nothing by the registration. The transfer of the charge to him was not made by the registered proprietor of it, and was therefore utterly void. He acquired no title by the registration,

(1) [1905] A. C. 392.

(2) [1903] 1 Ch. 631.

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and has therefore lost nothing by the removal of his name : ss. 40, 49, 98 of the Land Transfer Act, 1875.

[VAUGHAN WILLIAMS L.J. Suppose that before discovery of the fraud Odell had transferred the charge for value ; would he not have obtained an advantage by being on the register ?]

In such a case the register would be rectified by removing the names of Odell and his transferee, and the latter would be entitled to indemnity under s. 7. But under sub-s. 6 of s. 7 the registrar could recover from Odell what he had paid to his transferee.

*P. O. Lawrence, K.C., and Baden Fuller*, for the respondent Odell. It is submitted that *Sheffield Corporation v. Barclay* (1) does not apply to the present case ; there was no warranty upon which the registrar relied and no implied contract to indemnify him. The registrar could not incur any liability or suffer any loss by reason of his acting upon any document which was registered, and therefore there could not be implied any contract to indemnify him. Nor could there be any warranty of the genuineness of the transfer, for there would be no consideration for it. Under s. 40 of the Act of 1875 the registrar is bound to register a transfer tendered to him. If the registrar refuses to register an application can be made to the Court to rectify the register.

[VAUGHAN WILLIAMS L.J. referred to s. 52 of the Act of 1875.]

No claim for compensation can be made against the registrar or the Land Registry. The case is totally different from *Sheffield Corporation v. Barclay* (1) or *Starkey v. Bank of England*. (2) In both those cases the person who made the entry of the transfer on the company's register incurred a pecuniary obligation towards the person whose name was removed from it.

[VAUGHAN WILLIAMS L.J. Suppose a man knowingly procured the registration of a fraudulent document ?]

Even in that case there would be no warranty and no implied contract to indemnify as between him and the registrar. His name could be removed from the register at the instance of the real owner. It is a mistake to apply the analogy of a

(1) [1905] A. C. 392.

(2) [1903] A. C. 114.

trading corporation or a municipal corporation to a Government department.

[VAUGHAN WILLIAMS L.J. Take the case of a sheriff making a wrongful seizure.]

In such a case the sheriff is personally liable to the person whose goods he has wrongfully seized.

It has been argued that Odell has suffered no loss by reason of the rectification of the register. No doubt the ultimate cause of the loss was the forgery, but in every case to which s. 7 applies there must have been a rectification of the register before the right to compensation would arise. Take the simple case of a void instrument followed by a transfer for value; then, under s. 7, sub-s. 2, there could be a rectification of the register and the innocent person would be indemnified. The registration of a person as proprietor of freehold land with an absolute title vests in him an estate in fee simple in the land: s. 7 of the Act of 1875; and the registration of a transfer of the land for value confers on the transferor an estate in fee simple in the land: s. 30 of the Act of 1875. Before the Act of 1897 there could be no rectification of the register in such a case: ss. 95 to 98 of the Act of 1875. It was the intention of the Act of 1875 that anyone should be able to deal with a person who was on the register with an absolute title as having the fee simple in the land in whatever way he had got upon the register, even if he had been party to a fraud.

[*R. J. Parker*. It is contended that in the case of forgery no one can rely upon s. 30 of the Act of 1875.]

The Act does not except a person who has got upon the register by a fraud.

[COZENS-HARDY L.J. Suppose a man who was only a mortgagee had got upon the register with an absolute title; would there be no way of getting him off?]

The Court could order him to execute a transfer, or, if he refused to do so, could direct someone to execute a transfer for him.

[COZENS-HARDY L.J. Could not rectification be obtained under s. 95?]

Under that section the only alterations that can be made are

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such as do not interfere with the estate of the person who is registered. In the case of registration with a possessory title no protection was given by the registration. For this reason the Act of 1875 became practically a dead letter. A great change has been made by the Act of 1897. One of the inducements to people to avail themselves of the Act is the establishment of an indemnity fund by s. 21 of that Act. The simple question now to be decided is, whether Odell comes within the provisions of s. 7 of the Act of 1897. Sub-s. 1 deals with cases in which rectification of the register is impossible. Sub-s. 2 is not expressed as applying only to a registered disposition for value. It was admitted by the Attorney-General that, if before the fraud had been discovered Odell had transferred the charge for value and the transferee had been registered, he would, on a subsequent rectification of the register by the removal of his name, have been entitled to an indemnity. But why would the transferee in such a case have suffered loss by reason of the rectification any more than Odell has? He, equally with Odell, would have applied for the registration of a void transfer.

[VAUGHAN WILLIAMS L.J. In such a case the transferor would be upon the register.]

But still it is the forgery, not the rectification, which causes the loss. There are no words which except the original grantee from s. 7. He would rely upon the register just as much as would his sub-grantee. He had the original certificate of Mrs. Connell's registration.

[VAUGHAN WILLIAMS L.J. The register would confer no right upon him without a transfer from her.]

Sect. 7 says nothing about relying upon the register. The person who suffers loss is not necessarily the person whose name is on the register; the person who has been struck off is included. In neither case is the loss suffered merely by reason of the rectification.

[VAUGHAN WILLIAMS L.J. Can you suffer loss by the destruction of anything unless at some time you have or could have relied upon its existence? Could Odell in any conceivable circumstances have relied upon the entry of his name upon the register?]



There is no real distinction between the case of the original grantee and that of a transferee from him; if the former is not entitled to an indemnity no one can be entitled. The omission to register notice of an equitable interest would be "neglect" under sub-s. 3 of s. 7, and this shews that the person entitled to an indemnity need not be on the register. "Neglect" must mean something blamable, not merely the bringing in of the void document for registration, otherwise no one could obtain compensation. A sub-grantee, equally with the original grantee, would in that way bring about the loss. The one would be as much to blame as the other, though in neither case would there be any moral obliquity. The loss to Odell was not caused by his bringing in the transfer for registration, for he had paid his purchase-money before he did that. A genuine transfer presented for registration by a transferee, who has no title because the transfer to his transferor is a forgery, is as void as the forged transfer itself. It is submitted that sub-s. 4 of s. 7 exactly hits the present case. The words "the person suffering loss" must include the original grantee, even if they are not confined to him. Sub-s. 4 confers a wider right than sub-s. 2; it gives an additional right to indemnity. The "grantee" must include the person who takes under the void instrument. There was no reason for mentioning the grantee if he was not to be entitled to compensation. This shews that "act" in sub-s. 3 must mean an act which conduced to the fraud, not the mere act of procuring the registration. *Gibbs v. Messer* (1) was a decision upon an Australian statute, and sub-s. 4 of s. 7 of the Act of 1897 was intended to meet that very case and to enable the Court to give compensation. In that case a fictitious person was on the register, and a transfer purported to have been executed by him. But some observations made by Lord Watson in his speech may apply to the present case.

[VAUGHAN WILLIAMS L.J. Sect. 7 of the Act of 1875 says that "the first registration of any person as proprietor of reehold land with an absolute title shall vest" in that person an estate in fee simple in the land, subject to registered incumbrances and other liabilities; but I cannot find in the Act any

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similar provision for vesting in the case of a registered charge. It was found that this provision as to land might work injustice, and so the Act of 1897 provides that an owner of land who has by a wrongful registration been deprived of his estate may be replaced on the register, and that the person who would otherwise have had an estate in fee simple shall be indemnified. This provision seems simple enough in the case of land, but how does it apply to a charge on land with regard to which there are in the Act no words of vesting?]

If it does not apply, a mortgagee who had been wrongfully removed from the register could never obtain compensation. It is submitted that sub-s. 2 of s. 7 of the Act of 1897 applies to a possessory title.

[STIRLING L.J. By s. 8 of the Act of 1875 registration with a possessory title creates an estate in fee simple, subject to certain estates and rights. The person so registered might be entitled to compensation if his title were defeated by other rights.]

The registration of a charge confers rights upon the proprietor: ss. 23—26 of the Act of 1875; e.g., under s. 25, the right of entry upon the land charged. A mortgagor whose name was removed from the register would be deprived of that right of entry.

[COZENS-HARDY L.J. referred to s. 40 of the Act of 1875.]

Sect. 32 of the Act of 1875 applies to the transfer of land registered with a possessory title.

[VAUGHAN WILLIAMS L.J. Could a mortgagee inquire into the title of his mortgagor?]

A mortgagee can always decline to lend his money unless he is satisfied as to the mortgagor's title. And if he has advanced money he can demand repayment. At any rate, by removal from the register a mortgagee would be deprived of the value of his security. It is submitted that s. 7 of the Act of 1897 must apply to mortgagees or transferees of charges. It would be inconsistent with the whole scheme of the Act if a transferee for value of a charge on land cannot be removed from the register, while the owner of the land who created the charge can be removed because he claims title through a void deed. Sub-s. 4

of s. 7 must have been intended to cover a case in which it was possible to obtain rectification of the register; before this there was no provision applicable to voidable dispositions. A "registered disposition" must mean any dealing with registered land, such as a charge upon it.

[*R. J. Parker*. It is not disputed that the transfer to Odell would have been a "registered disposition" if it had not been a forgery.]

Sub-s. 4 of s. 7 was intended to apply to the original grantee, for whom no provision had been made previously. In the case of a voidable deed the original grantee could be struck off the register, and any voluntary transferee from him, but a transferee for value could not: s. 33.

The main object of sub-s. 4 was to compensate the grantee, but it is not limited to him. That sub-section was intended to meet the decision in *Gibbs v. Messer*. (1) The registrar could not recover the compensation paid from anyone but the person who was to blame, i.e., in the present case, the solicitor Thomson. In one sense no doubt Mrs. Connell caused the loss by leaving her title deeds in the custody of her solicitor. There was nothing wrong in her doing that, but he has committed a forgery.

The two Acts together constitute one code. The object of the Act of 1875 was, so far as it is possible, to make land transferable in the same way as stock or shares; that the register should contain the name of the legal owner of the land, and that equities should be dealt with outside the register. The register does not necessarily shew who is entitled, for registered land may be dealt with by an unregistered deed: *Capital and Counties Bank v. Rhodes*. (2) But the registered owner with an absolute title can confer a good title; and it is submitted that the proprietor of a registered charge stands in a similar position.

By s. 22 of the Act of 1875 a charge on land made by the registered proprietor is completed by the entry of the chargee on the register as the proprietor of the charge. By s. 40 the transfer of a registered charge is to be completed by the registration of the transferee "as proprietor of the charge transferred." That must mean that he has all the rights of the original registered

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chargee. He does not take any estate in the land. This explains ss. 95 and 96 of the Act of 1875. The power given to the Court to rectify the register is limited only by the proviso that the Court must have regard to registered estates or rights created by the Act. The Court could order rectification though the registered owner was affected by an equity. Sect. 7, sub-s. 4, must, at any rate, have been intended to apply to an innocent grantee. And even if sub-s. 3 applies, Odell has not "caused or substantially contributed to the loss." The word "caused" must apply to the *causa causans*, or principal cause. A person who has "contributed" to the loss must mean an accessory to the wrongful act, not a merely formal contributor: the expression must mean a guilty person.

*Sheffield Corporation v. Barclay* (1) does not really apply. In that case there were three persons interested—the real owner of the stock, the transferees, and the corporation; and it was held that the transferees must bear the loss because there was an implied contract by them with the corporation that the transfer which they tendered for registration, and which was in fact a forgery, was genuine. That case related to personal property, and the corporation was under a contractual obligation to the stockholder. There is no such obligation on the part of the registrar. The person who presents a transfer of a charge for registration enters into no implied contract with the registrar that the document is genuine, and the Act of 1897 has, by sub-s. 6 of s. 7, expressly provided who is to indemnify the registrar against loss, namely, the person who by his act or default has caused or substantially contributed to the loss.

It is a fallacy to say that Odell has suffered no damage by the rectification of the register. So long as his name was on the register he could confer an indefeasible interest on his transferee. Of this right he has been deprived by the rectification. If this be not so, then in every such case it must be held that the loss was occasioned by that which gave the right to rectification—that is, the discovery of the fraud.

*R. J. Parker*, in reply. The only material point, outside the construction of s. 7 of the Act of 1897, is whether s. 98 of the

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Act of 1875 applies to voidable as well as to void instruments. Sects. 29 and 30 of the Act of 1875 shew what a registered proprietor of freehold land may do; he may transfer the land in the prescribed manner. If there is a forged transfer, it is not a transfer by the "registered proprietor," and the transfer is by s. 98 to be "fraudulent and void," except as against transferees for value who have relied upon its registration.

[VAUGHAN WILLIAMS L.J. I am inclined to think that s. 98 was intended to apply only to deeds which are fraudulent and therefore void.]

Odell, not having a transfer from the registered proprietor, acquired no title by the registration of the transfer, and therefore he has lost nothing by the rectification, notwithstanding that, being on the register, he could confer a good title on his transferee for value who had no notice of the fraud. A transfer by an infant or a lunatic would be only voidable. The title of the registered proprietor who is first placed on the register depends on the registration; the title of a subsequently registered proprietor depends in part upon his having a transfer from a registered proprietor. A person who is on the register may deal with the land by a registered or an unregistered deed: *Capital and Counties Bank v. Rhodes* (1); but while he is on the register he can confer a good title on a purchaser for value, even though he himself has no title. The object of the Acts was to facilitate the transfer of land—that there should be a person on the register who could dispose of the land free from any equity.

Sects. 95 and 96 of the Act of 1875 are expressed in very general terms; they do not say in what cases the register may be rectified; the matter is left to the ordinary jurisdiction of the Court, but subject to the limitation that the rectification is not to affect "any estates or rights acquired by registration in pursuance of" the Act. A purchaser for value without notice is always protected. Sect. 98 gives a right to a purchaser who derives title under a void instrument. What, then, is the effect of s. 7 of the Act of 1897? Sub-s. 1 deals with cases in which rectification is not possible: e.g., where a voidable deed is executed by a son in favour of his father, and the father then

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assigns to a purchaser for value, the son would be entitled to compensation. Sub-s. 2 deals with absolutely void instruments and cases in which the effect of an error, omission, or entry in the register would be to deprive a person of land of which he was in possession: then the person suffering loss by the rectification is to be indemnified. Sub-s. 3 deprives any person who has caused or substantially contributed to the loss "by his act, neglect, or default" of the right to an indemnity. Sub-s. 4 deals with cases which have not been dealt with by sub-s. 2. The words point rather to a voidable instrument, not to a void instrument which has no operation as a grant. But if fraud is included in sub-s. 4, what does the word "grantee" mean? It is submitted that it means a person who is a grantee from a registered proprietor, not a person who claims to be a grantee under a fraudulent and void disposition.

It is submitted that Odell has not been damnified by the rectification. He did not rely upon the register when he advanced his money; he took no interest by reason of the registration; and the fact that he was by the rectification deprived of an overriding power to dispose of the land charged is no damnification, for it would have been a fraud to do so. And, if he has suffered loss by the rectification, he substantially contributed to the loss by handing in the forged transfer for registration.

*Cur. adv. vult.*

April 7, 1906. VAUGHAN WILLIAMS L.J. stated the facts, and continued:—It has been urged in this case by Sir Robert Finlay with great force that the decision of the House of Lords in the case of *Sheffield Corporation v. Barclay* (1), and in particular the opinion of Lord Davey in that case, are applicable in the present case. In other words, it is argued that in the case of an application to register a transfer under the Land Transfer Acts, 1875 and 1897, by the registered proprietor of a charge to another person as proprietor there is implied by law a contract by the person making the application to register to keep indemnified the person having the duty to register against any liability which

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may result from the exercise of the duty to register, and that the person requesting, directing, or demanding registration will be liable to the obligations of such implied contract notwithstanding the fact that he was not aware of any invalidity in his title to make such request, and could not with reasonable diligence have discovered it.

I do not think that it was argued that this implied covenant would arise in every case of a person applying for registration under the Land Transfer Acts; for instance, I do not think that it was argued that such an implied contract to indemnify the registrar would arise in the case of an application for first registration of any person as proprietor of freehold land with an absolute title, which registration, by the terms of s. 7 of the Act of 1875, vests in the person so registered an estate in fee simple in such land, and is the act of the registrar acting to some extent in a judicial capacity, hearing objections and determining them, subject to an appeal to the Court. It seems to me, therefore, that before the Court can come to the conclusion that the principle declared by the decision of the House of Lords in *Sheffield Corporation v. Barclay* (1) applies to a person applying to register and registering a transfer by the registered proprietor of a charge on land, the Court must examine carefully what are the provisions of the Land Transfer Acts, 1875 and 1897, generally, and in particular in regard to the transfer of such charges.

In my opinion, however, it is not necessary to decide this question in the present case, and for this reason—that either the plaintiff is or he is not entitled to the statutory indemnity under the Land Transfer Act, 1897. If he is so entitled, this is wholly inconsistent with the application of the principle of *Sheffield Corporation v. Barclay*. (1) If he is not so entitled, this appeal must succeed, whether or not the principle of *Sheffield Corporation v. Barclay* (1) applies to applications to register under the Land Transfer Acts. No question is raised on this appeal as to any obligation on the applicant to indemnify the registrar. I will proceed, therefore, to examine those Acts.

It is to be remembered that the object of the Land Transfer

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Acts is, as the preamble states, to make provision for the simplification of title to land, and for facilitating the transfer of land in England by means of registration. In the preliminary chapter of Messrs. Brickdale and Sheldon's book on the Land Transfer Acts, p. 1, there is a statement to the following effect: "The Land Transfer Act, 1875, effects the purpose set forth in its title and preamble, 'to simplify titles and facilitate the transfer of land,' by four main methods. First, it removes the obligation under which purchasers and mortgagees now labour of having to peruse and consider the validity of past transactions the effect of which has been exhausted. Second, it relieves them from responsibility in regard to subsisting settlements, trusts, and equities affecting the vendor's or mortgagor's title. Third, it provides plain and simple methods for effecting transfers and charges. Fourth, it gives an absolute guarantee of title to purchasers and mortgagees who comply with its provisions."

I will now examine the provisions of the Act of 1875. Part I. deals with the entry of land on the register of title. Sect. 5 deals with the application for registration with an absolute title, or with a possessory title only; s. 6 with the evidence of title required on application. Sect. 7 provides that the first registration of any person as proprietor of freehold land with an absolute title shall vest in the person so registered an estate in fee simple in such land. Sect. 8 provides that the registration of any person as first registered proprietor of freehold land with a possessory title only shall not affect or prejudice the enforcement of any estate, right, or interest adverse to or in derogation of the title of such first registered proprietor and subsisting or capable of arising at the time of the registration of such proprietor, but, save as aforesaid, shall have the same effect as registration of a person with an absolute title. It would appear, therefore, that, subject to the provisions for rectification, registration as proprietor of freehold land with an absolute title is not liable to be affected by the enforcement of any estate, right, or interest adverse to or in derogation of such title. Sect. 10 provides for the delivery to the registered proprietor of a certificate called a land certificate, which certificate, I think, is rightly stated in the note on p. 151 of Brickdale and Sheldon's Land Transfer Acts



(2nd ed.) for almost all purposes to take the place of title deeds. Then follow the sections dealing with registration of leasehold land; and in this case also the registration as first registered proprietor, with a declaration that the lessor had an absolute title to grant the lease under which the land is held, is to be deemed to vest in such person the possession of the land for all the leasehold estate therein described. Sect. 17 deals with the regulations as to the examination of title by the registrar in the case of freehold and leasehold land, and sub-s. 1 provides for prescribed notices giving persons an opportunity to come in and object; and sub-s. 2 provides that the registrar shall have jurisdiction to hear and determine any such objections, subject to an appeal to the Court. The registrar in this case would seem to be exercising a judicial function.

Part II. deals with registered dealings with registered land, and provides for the creation of charges by every registered proprietor of freehold or leasehold land, and the delivery of a certificate of charge. And the remainder of the sections under this head deal with the covenants to be implied upon the registration of such mortgage or charge and other matters as to the entry on the land by the registered proprietor of a registered charge, his power of sale, priority, and discharge of registered charges. Sect. 29 deals with the transfer of freehold land by registered proprietors of such land and for delivery to the transferee of a land certificate. Sect. 30 provides that a transfer for valuable consideration of freehold land registered with an absolute title shall, when registered, confer on the transferee an estate in fee simple in the land transferred, subject to certain rights and liabilities there specified, but free from all other estates or interests whatsoever, including estates and interests of the Crown. Under the heading "Transfer of leasehold land" one finds *mutatis mutandis* similar provisions with regard to transfers of leasehold land in the case of transfer for valuable consideration of leasehold land with a declaration of the absolute title of the lessor.

It seems to me difficult, in the case of the application by a person for registration resulting in his registration as first registered proprietor of freehold land or of leasehold land with a

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declaration of the absolute title of the lessor, to raise the implied covenant to indemnify the registrar, such as that referred to in the decision of the House of Lords in *Sheffield Corporation v. Barclay* (1), in case the registered proprietor shall turn out not to have a good title. So far as the title of the first registered proprietor is concerned, the words as to the conferring on the transferee in the one case an estate in fee simple, and in the other case the words as to vesting in the transferee the possession, do not seem to me reconcilable with the raising of such implied covenant of indemnity.

I will now consider s. 40, which deals with the transfer of charges. It provides that "the registered proprietor of any charge may, in the prescribed manner, transfer such charge to another person as proprietor. The transfer shall be completed by the registrar entering on the register the transferee as proprietor of the charge transferred; the registrar shall also, if required, deliver to the transferee a fresh certificate of charge, but the transferor shall be deemed to remain proprietor of such charge until the name of the transferee is entered on the register in respect thereof." In Sched. I., s. 40, to the Act of 1897, it is provided that a registered transferee for value of a charge shall not be affected by any irregularity or invalidity in the original charge itself of which the transferee was not aware when it was transferred to him. This schedule is the schedule of minor amendments which derives its legislative force from s. 18 of the Act of 1897.

The transfer of the charge in the present case was not in fact executed by the registered proprietor, but was a forgery; and it seems to follow that under ss. 95 and 96, to which I will presently refer, the forged transfer is a nullity and can be expunged and the register rectified under those sections. The minor amendments of s. 40 in Sched. I. do not touch the case, because the application of those amendments is limited to cases of invalidity or irregularity in the original charge itself. It is not, however, quite consistent with the scheme of the Act if the transferee from the registered proprietor of a registered charge should be affected by irregularity or invalidity of intermediate registered

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charges; and, in my opinion, sub-s. 4 of s. 7 of the Act of 1897 would give the last transferee indemnity in such a case, since he surely falls within the class of those whom the statute seems intended to protect, that is, those who have acted upon the genuine signature to an instrument of transfer executed by the registered proprietor of the charge. Sect. 95 of the Act of 1875 deals with the rectification of the register, and provides that, "subject to any estates or rights acquired by registration in pursuance of this Act, where any Court of competent jurisdiction has decided that any person is entitled to any estate, right, or interest in or to any registered land or charge, and as a consequence of such decision such Court is of opinion that a rectification of the register is required, such Court may make an order directing the register to be rectified in such manner as it thinks just." This section, coupled with s. 96, establishes, to my mind, the right of the person who has obtained an adjudication that the transfer purporting to be executed by such person as the transferee of a charge is a forgery, to have the register rectified by the removal of the entry procured by the person claiming under the forged transfer; but it is to be observed that the right of rectification is subject to any estates or rights acquired by registration in pursuance of the Act. As I understand the section taken by itself, the estate of a first registered proprietor of land with absolute title would not be affected, nor would the estate or right taken under a transferee from him, or under any sequence of transfers concluding with a transfer executed by a registered proprietor of land with absolute title.

I will now deal with the Act of 1897, and in particular with the indemnity section (s. 7) and its relation to the facts of the present case. In construing s. 7 it is to be remembered that the Act of 1875, ss. 95 and 96, which provided for rectification, made no provision for indemnity, whereas s. 7 of the Act of 1897 not only makes provision for indemnity, but seems by sub-s. 2 to extend the area of rectification. Sect. 7 of the Act of 1897 begins thus, with sub-s. 1: "Where any error or omission is made in the register, or where any entry in the register is made or procured by or in pursuance of fraud or mistake, and the error, omission or entry is not capable of rectification under the principal Act,

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any person suffering loss thereby shall be entitled to be indemnified in the manner in this Act provided." This sub-section has no application to the present case, because the entry of the name of Mr. Odell is capable of rectification. Sub-s. 2 of s. 7 provides "that where a registered disposition would if unregistered be absolutely void, or where the effect of such error, omission, or entry, would be to deprive a person of land of which he is in possession, or in receipt of the rents and profits, the register shall be rectified, and the person suffering loss by the rectification shall be entitled to the indemnity." This sub-section seems to extend the area of rectification, for it provides for rectification in cases where the effect would be to destroy estates or rights acquired by registration under this Act. The sub-section appears only to apply to land, but this is not very clear. Sub-s. 3 of s. 7 excludes from indemnity a person who has contributed to any loss by his act, neglect, or default. In this case the facts found prevent this part of the sub-section from applying to Mr. Odell. The latter part of this sub-section deals with omissions to register. Then comes sub-s. 4, which runs thus: "Where the register is rectified under the principal Act by reason of fraud or mistake which has occurred in a registered disposition for valuable consideration, and which the grantee was not aware of, and could not by the exercise of reasonable care have discovered, the person suffering loss by the rectification shall likewise be entitled to indemnity under this section." It is under this sub-section, if at all, that Mr. Odell can claim indemnity for loss suffered by him from the rectification of the register by the erasure of his name as registered proprietor of this charge. These words are undoubtedly capable of a construction wide enough to support Mr. Odell's claim to indemnity on the ground that he has suffered loss by the rectification of the register necessitated by reason of the fraud and forgery of the name of the registered proprietor of the charge, but on its true construction I do not think that this sub-section entitles Mr. Odell to indemnity. It is true that the register has been rectified by reason of fraud which has occurred in a registered disposition for valuable consideration, but in my judgment the whole scheme of the Acts is to afford facilities and



give security in the transfer of land and in the creation and transfer of incumbrances thereon to those who have acquired estates or rights by registration, or to those who have for valuable consideration become transferees from registered proprietors of land or charges. I cannot, having regard to the decision of this Court and the observations of Cozens-Hardy L.J. (1), speak, in relation to this Act, of legal estates as passing by reason of registration, but merely of overriding rights; but, using the words "estates or rights" (which are the words used in the 95th section of the Act of 1875) in the sense of overriding rights, I think that Mr. Odell has no claim to indemnity under this sub-section. His name as registered proprietor of the charge has not been put on the register after any judicial investigation, such as that which takes place before the registration of a person as first registered proprietor of freehold land with absolute title, or a possessory title, or a qualified title (see ss. 7, 8, and 9 of the Act of 1875), or the registration of the first registered proprietor of leasehold land with a declaration of title of the lessor to grant the lease (see s. 13 of the Act of 1875, and r. 46 of the Rules of 1898). The act of the registrar in putting the name of a transferee of a charge on the register is a mere ministerial act in the performance of a ministerial duty. It confers on the transferee no estate or right which he had not before registration. The utmost which it confers on him is the capacity to transfer to a purchaser for valuable consideration unaware of any irregularity in the transaction. But it may be said that Mr. Odell has, by the rectification of the register, lost this capacity to transfer, because, until the rectification by the erasure of his name from the register, he could have given a good title to a transferee of the charge for valuable consideration, and that by the erasure he has lost this, but I do not think that it is by the erasure that he has lost this capacity; he could not, in my judgment, have exercised this power given to him by the ministerial, not the judicial, act of the registrar after notice of the fact of the forgery, and I think that he could be restrained by injunction from so doing.

There is one more suggestion with which I have to deal—that

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is, that the words of amendment 40 in the First Schedule to the Land Transfer Act, 1897, which is an amendment of s. 40 of the principal Act, do not, when properly construed, affect the title of registered transferees of a charge with any irregularity or invalidity in respect of title, unless such irregularity or invalidity is to be found in the original charge itself. But I do not agree in this construction. It is to be observed that, in the case of charges, the object of the Act is to protect those who take a charge in reliance on the Act and follow the steps prescribed by the Act. Now it is plain that an original charge, if it is invalid by reason of forgery or otherwise, has not been made good by being placed on the register; there is no judicial act such as there is on the first registration of title to freehold or leasehold land, and the result is that the original charge on which the whole succession of transfers is based is itself invalid, and I am inclined to think that this accounts for and is the reason of the amendment in question in the First Schedule of the Act of 1897.

I think that Mr. Odell is not entitled to indemnity, and that this appeal must be allowed.

STIRLING L.J. stated the facts, and continued :—In support of this appeal two main grounds were urged : (1.) that the application of Odell was precluded by the decision of the House of Lords on July 3, 1905 (a date subsequent to that of the decision of Kekewich J.), in *Sheffield Corporation v. Barclay* (1), and (2.) that in the circumstances, and upon the true construction of the Acts, Odell was not entitled to the indemnity which he claimed. It was admitted that Odell was entirely innocent, and acted in perfect good faith in the transaction, and it was not alleged that he could by the exercise of reasonable care have discovered the invalidity of the transfer. The case cited, however, shews that if the transaction had related to stock or shares governed by the provisions of the Companies Clauses Act, 1845, or similar provisions in a private Act of Parliament, Odell would, in the circumstances stated above, have been liable to indemnify the company or corporation, whose stock or shares were the subject-matter

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of the transaction, against liability arising from the company or corporation having acted on his request to register the forged instrument. If the principles on which that decision is based apply to the Land Registry, then Odell's claim must fail. The Land Registry is a branch of the public service, established and conducted under and in accordance with the provisions of the Land Transfer Acts of 1875 and 1897. The registrar is a servant of the Crown, appointed by the Lord Chancellor, receiving a salary paid by the Treasury out of moneys provided by Parliament (Act of 1875, s. 106). By s. 108 of the same Act it is enacted that "subject to the provisions of this Act, the registrar shall conduct the whole business of registering land under this Act." For the services rendered by the registry fees are charged, which by virtue of s. 113 of that Act came under the control of the Treasury, and ultimately (subject to the deduction of certain expenses) found their way into the Consolidated Fund. This section has been repealed, and the fees are now dealt with under the Public Offices Fees Act, 1879 (42 & 43 Vict. c. 58), but they still constitute part of the public funds.

When land is for the first time placed on the register, the registrar has important duties of a judicial or quasi-judicial nature to perform as regards the examination of the title; but, as regards transfers of registered charges on registered land, his duties are of a ministerial character. Neither the Acts, nor the rules made under them, impose on the registrar the duty of ascertaining that the instrument of transfer has been duly executed, except to the extent of sending to the registered proprietor, at his registered address, notice of the fact that the instrument has been delivered at the registry for registration, and abstaining from completing the registration for three clear days from the posting of the notice. This precaution was taken in the present case, but, unfortunately, was ineffectual by reason of the registered proprietor's absence from home.

Sect. 40 of the Act of 1875 prescribes that a transfer by the registered proprietor shall be completed by the registrar entering on the register the transferee as proprietor of the charge; and also that the registrar shall, if required, deliver to the

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transferee a fresh certificate of charge. It is to be remarked that the Act contains no provision conferring on the transferee of a charge any estate or right or interest such as is found in s. 30 with respect to transfers of land. The Act of 1875 provided for rectification of the register in certain cases (see ss. 95—97), but did not in any way provide for indemnity to any person to whom loss was caused either by errors or omissions in the register or by rectification. This was altered by the Act of 1897, s. 7 of which confers a right to indemnity in the following cases: sub-s. 1, where any error or omission is made in the register, or where any entry in the register is made or procured by fraud or mistake, and the error, omission, or entry is not capable of rectification under the Act of 1875; sub-s. 2, where a registered disposition would, if unregistered, be absolutely void, or where the effect of such error or omission or entry would be to deprive a person of land of which he is in possession or in receipt of the rents and profits; and sub-s. 4, where the register is rectified under the Act of 1875 by reason of fraud or mistake which has occurred in a registered disposition for valuable consideration, and which the grantee was not aware of and could not by the exercise of reasonable care have discovered.

The order for rectification in the present case may have been made under ss. 95 and 96 of the Act of 1875, or under s. 7, sub-s. 2, of the Act of 1897; in either case the enactment is that the person suffering loss by the rectification shall be entitled to indemnity. A limitation to this right is imposed by sub-s. 3 of s. 7, which provides that a person shall not be entitled to indemnity for any loss where he has caused or substantially contributed to the loss by his act, neglect, or default. Sub-s. 6 provides that where indemnity is paid for a loss, the registrar, on behalf of the Crown, shall be entitled to recover the amount paid from any person who has caused or substantially contributed to the loss by his act, neglect, or default. Sect. 21 of the Act of 1897 enacts that for the purpose of providing indemnity payable under the Act there shall be established an insurance fund to be raised by setting apart a certain portion of the receipts from fees taken in the Land Registry; that this insurance



fund shall be invested in such names and manner as the Treasury from time to time direct; and that if the insurance fund is at any time insufficient to pay indemnity for any loss chargeable thereon, the deficiency shall be charged on and paid out of the Consolidated Fund.

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Now the principle of the decision in *Sheffield Corporation v. Barclay* (1) is thus stated by Lord Davey: "I think that the appellants have a statutory duty to register all valid transfers, and on the demand of the transferee to issue to him a fresh certificate of title to the stock comprised therein. But, of course, it is a breach of their duty and a wrong to the existing holders of stock for the appellants to remove their names and register the stock in the name of the supposed transferee if the latter has, in fact, no title to require the appellants to do so. I am further of opinion that where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another (it does not seem to me to matter which word you use), and without any default on his own part acts in a manner which is apparently legal but is, in fact, illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request, or could not with reasonable diligence have discovered it." Much of this is directly applicable to the present case. The registrar has a statutory duty, which (as I have already pointed out) is of a ministerial character, to register transfers of registered charges on registered land, and on the demand of the transferee to issue to him a certificate of proprietorship. It is a breach of duty and a wrong to the existing registered proprietor to remove his name and register the charge in the name of the supposed transferee if the latter has, in fact, no title to require the registrar to do so.

It is said, however, that the registrar incurs no personal

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liability when he is called upon to exercise his duty on the request, direction, or demand of another, and, without default on his own part, acts in a manner which is apparently legal but is, in fact, illegal and a breach of duty. I do not think it is necessary to decide that this proposition is well founded, but it seems to me very likely that it may prove to be so, for this reason, that the rights of registered proprietors being purely statutory, and remedies being in certain specific cases (of which the present is one) given by the same statute for the violation of those rights, it may well be that registered owners are not entitled to other remedies than those given, and are in particular excluded from any action against the registrar. I shall, therefore, assume that the registrar is under no personal liability in the present case. Still, the legal position appears to be this: The registrar is a servant of the Crown, "conducting"—in the language of s. 108 of the Act of 1875—"the whole business of registering land" under the Land Transfer Acts, 1875 and 1897. The fees taken in the Land Registry form part of the public revenue, and are, in the eye of the law, Crown property. The acts of the registrar are contemplated by the Act of 1897 as being capable of giving rise to rights to indemnity which are to be satisfied out of a portion of the fees, and if necessary out of the Consolidated Fund, that is, out of Crown property. The acts of the registrar may therefore, under the statute, give rise to liability on the part of the Crown. It seems to me that in this state of things there may and ought to be implied a contract by a person applying to the registrar to register a transfer, to keep the Crown indemnified against any liability which may result from the exercise by the registrar, as the servant of the Crown, of the supposed duty to register the instrument presented to him. It may be a question whether such contract ought to be implied with the Crown directly, or with the registrar, the head of this department of Crown business, who is by the Act of 1897 expressly authorized to sue on behalf of the Crown where indemnity has been paid for a loss. It would seem that a good deal may be said for the latter view, but for the purpose of the present decision it is unnecessary to decide which is the more correct.

Even if no such contract can be implied, I still think that this claim to compensation ought not to succeed. It is laid down by Lord Davey in the same case of *Sheffield Corporation v. Barclay* (1) that a person who brings a transfer to a registering authority, and requests him to register it, thereby makes a representation that it is a genuine document; and he further said that he was disposed to think (though it was not necessary so to decide) that such person not only affirmed it to be genuine, but warranted that it was so; and he expressly said that he considered this to be the result of the decision in *Oliver v. Bank of England* (2), affirmed in the House of Lords under the name of *Starkey v. Bank of England*. (3) Consequently, Odell, who brought the transfer to the registrar and requested him to register it, thereby affirmed and warranted that the transfer was genuine, which it was not. This act on his part (although innocent) directly brought about the registration of the charge in his name, and, in my opinion, caused or substantially contributed to the loss of which he now complains. Further, if he had, before the discovery of the forgery, transferred the charge to a purchaser for value without notice whose name was afterwards removed from the register and who received indemnity, I think that the registrar would have been entitled to recover the amount paid from him under s. 7, sub-s. 6, of the Act of 1897.

I think, therefore, that the principles laid down in *Sheffield Corporation v. Barclay* (4) apply, and on this ground, which was not open to Kekewich J., I think that his decision ought to be reversed and the claim of Odell disallowed. It is, therefore, unnecessary to say anything on the second of the two grounds which I have mentioned; but as this portion of the case has been fully discussed by my brethren, I wish to add that I do not differ from their conclusions, though I have entertained a doubt, which is not wholly removed, whether Mr. Odell did not, by the removal of his name from the register, lose the benefits which are conferred on the registered proprietor for the time being of a charge by ss. 23—

(1) [1905] A. C. 403.

(3) [1903] A. C. 114.

(2) [1902] 1 Ch. 610.

(4) [1905] A. C. 392.

C. A. 27 of the Act of 1875, and thus become entitled to some compensation.  
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COZENS-HARDY L.J., after stating the facts and reading sub-s. 4 of s. 7 of the Land Transfer Act, 1897, continued:—Now, under the Land Transfer Act, 1875, a person who can prove (1.) that he has a transfer from a registered proprietor, and (2.) that he has been entered on the register as proprietor in respect of such transfer, has certain definite rights conferred upon him. If the transaction relates to land, the case is governed by s. 29 and following sections. If the transaction relates to a charge, the case is governed by s. 40. But no person, other than the person first registered, can claim any beneficial right or interest from the mere fact of being on the register unless he can also prove that he has a transfer from some person previously on the register, and in that sense has relied upon the register. Odell has no such transfer, and he has not suffered any “loss by the rectification,” and he is, therefore, not entitled to any indemnity under s. 7. On this ground, I think the appeal must succeed. If Odell had transferred his charge to X., who, without notice of the forgery, had been entered on the register, X. might have had a claim for indemnity, because X. would have fulfilled both the required conditions. He would have relied, as he was entitled to rely, upon the fact that Odell was registered as proprietor. His position would be substantially different from that of Odell. I may observe that Odell took what purported to be an indorsed transfer of Mrs. Connell’s original mortgage as well as a transfer of the land charge. In the result he takes no benefit under or by virtue of either of these forged documents.

In the course of the argument many points of great importance and of considerable difficulty were raised. In my view, it is neither necessary nor desirable to express any opinion except upon the one point which is sufficient to dispose of this appeal.

Their Lordships accordingly made an order allowing the appeal and discharging the order of the registrar. Counsel for the Attorney-General not objecting, the respondent’s costs of the



appeal and also those directed to be paid by the order of Kekewich J. and by the registrar's award were ordered to be paid out of the insurance fund.

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Solicitors: *The Solicitor to the Treasury; J. T. Rossiter.*

NOTE.—The Land Transfer Act, 1875 (38 & 39 Vict. c. 87)—

Sect. 7: "The first registration of any person as proprietor of freehold land (in this Act referred to as first registered proprietor), with an absolute title, shall vest in the person so registered an estate in fee simple in such land, together with all rights, privileges, and appurtenances belonging or appurtenant thereto, subject as follows:—

"(1.) To the incumbrances, if any, entered on the register; and

"(2.) Unless, under the provisions of this Act, the contrary is expressed on the register, to such liabilities, rights, and interests, if any, as are by this Act declared not to be incumbrances; and

"(3.) Where such first proprietor is not entitled for his own benefit to the land registered as between himself and any persons claiming under him, to any unregistered estates, rights, interests, or equities to which such persons may be entitled,

but free from all other estates and interests whatsoever, including estates and interests of Her Majesty, her heirs and successors."

Sect. 8: "The registration of any person as first registered proprietor of freehold land with a possessory title only shall not affect or prejudice the enforcement of any estate, right, or interest adverse to or in derogation of the title of such first registered proprietor, and subsisting or capable

of arising at the time of registration of such proprietor; but, save as aforesaid, shall have the same effect as registration of a person with an absolute title."

Sect. 22: "Every registered proprietor of any freehold or leasehold land may in the prescribed manner charge such land with the payment at an appointed time of any principal sum of money either with or without interest, and with or without a power of sale to be exercised at or after a time appointed. The charge shall be completed by the registrar entering on the register the person in whose favour the charge is made as the proprietor of such charge, and the particulars of the charge, and of the power of sale, if any; the registrar shall also, if required, deliver to the proprietor of the charge a certificate of charge in the prescribed form."

Sect. 23: "Where a registered charge is created on any land there shall be implied on the part of the person being registered proprietor of such land at the time of the creation of the charge, his heirs, executors, and administrators, unless there be an entry on the register negating such implication, a covenant with the registered proprietor for the time being of the charge to pay the principal sum charged, and interest, if any, thereon, at the appointed time and rate; also a covenant, if the principal sum or any part thereof is unpaid at the appointed time, to pay interest half-yearly at the appointed rate on so

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much of the principal sum as for the time being remains unpaid."

Sect. 24: "Where a registered charge is created on any leasehold land there shall be implied on the part of the person being registered proprietor of such land at the time of the creation of the charge, his heirs, executors, and administrators, unless there be an entry on the register negating such implication, a covenant with the registered proprietor for the time being of the charge, that the person being registered proprietor of such land at the time of the creation of the charge, his executors, administrators, and assigns, will pay, perform, and observe the rent, covenants, and conditions by and in the registered lease reserved and contained, and on the part of the lessee to be paid, performed and observed, and will keep the proprietor of the charge, his heirs, executors, and administrators, indemnified against all actions, suits, expenses and claims, on account of the non-payment of the said rent, or any part thereof, or the breach of the said covenants or conditions, or any of them."

Sect. 25: "Subject to any entry to the contrary on the register, the registered proprietor of a registered charge may, for the purpose of obtaining satisfaction of any moneys due to him under the charge, at any time during the continuance of his charge, enter upon the land charged, or any part thereof, or into the receipt of the rents and profits thereof, subject nevertheless to the right of any persons appearing on the register to be prior incumbrancers, and to the liability attached to a mortgagee in possession."

Sect. 26: "Subject to any entry to the contrary on the register, the registered proprietor of a registered

charge may enforce a foreclosure or sale of the land charged, in the same manner and under the same circumstances in and under which he might enforce the same if the land had been transferred to him by way of mortgage, subject to a proviso for redemption on payment of the money named at the appointed time."

Sect. 27: "Subject to any entry to the contrary on the register, the registered proprietor of a registered charge with a power of sale may, at any time after the expiration of the appointed time, sell and transfer the land on which he has a registered charge, or any part thereof, in the same manner as if he were the registered proprietor of such land."

Sect. 29: "Every registered proprietor of freehold land may, in the prescribed manner, transfer such land or any part thereof. The transfer shall be completed by the registrar entering on the register the transferee as proprietor of the land transferred, but until such entry is made the transferor shall be deemed to remain proprietor of the land."

"Upon completion of the registration of the transferee the registrar shall, if required, deliver to him a land certificate in the prescribed form; he shall also, in cases where part only of the land is transferred, if required, deliver to the transferor a land certificate, containing a description of the land retained by him."

Sect. 30: "A transfer for valuable consideration of freehold land registered with an absolute title shall, when registered, confer on the transferee an estate in fee simple in the land transferred, together with all rights, privileges, and appurtenances belonging or appurtenant thereto, subject as follows:

"(1.) To the incumbrances, if any, entered on the register; and

“(2.) Unless the contrary is expressed on the register, to such liabilities, rights, and interests, if any, as are by this Act declared not to be incumbrances, but free from all other estates and interests whatsoever, including estates and interests of Her Majesty, her heirs and successors.”

Sect. 40: “The registered proprietor of any charge may, in the prescribed manner, transfer such charge to another person as proprietor. The transfer shall be completed by the registrar entering on the register the transferee as proprietor of the charge transferred; the registrar shall also, if required, deliver to the transferee a fresh certificate of charge, but the transferor shall be deemed to remain proprietor of such charge until the name of the transferee is entered on the register in respect thereof.”

[The Land Transfer Act, 1897 (60 & 61 Vict. c. 65), contains, in Sched. I., the following “minor amendment” to the above s. 40:—

“A registered transferee for value of a charge, and his successors in title, shall not be affected by any irregularity or invalidity in the original charge itself, of which the transferee was not aware when it was transferred to him.”]

Sect. 49: “The registered proprietor alone shall be entitled to transfer or charge registered land by a registered disposition; but, subject to the maintenance of the estate and right of such proprietor, any person, whether the registered proprietor or not of any registered land, having a sufficient estate or interest in such land, may create estates, rights, interests, and equities in the same manner as he might do if the land were not registered; and any person entitled to or interested in any un-

registered estates, rights, interests, or equities in registered land may protect the same from being impaired by any act of the registered proprietor by entering on the register such notices, cautions, inhibitions, or other restrictions as are in this Act in that behalf mentioned.

“The registered proprietor alone shall be entitled to transfer a registered charge by a registered disposition; but, subject to the maintenance of the right of such proprietor, unregistered interests in a registered charge may be created in the same manner and with the same incidents, so far as the difference of the subject-matter admits, in and with which unregistered estates and interests may be created in registered land.”

[The Land Transfer Act, 1897, contains, in Sched. I., the following “minor amendment” to the above s. 49:—

“This section includes power to sever the mines and minerals from the surface.”]

Sect. 95: “Subject to any estates or rights acquired by registration in pursuance of this Act, where any Court of competent jurisdiction has decided that any person is entitled to any estate, right, or interest in or to any registered land or charge, and as a consequence of such decision such Court is of opinion that a rectification of the register is required, such Court may make an order directing the register to be rectified in such manner as it thinks just.”

Sect. 96: “Subject to any estates or rights acquired by registration in pursuance of this Act, if any person is aggrieved by any entry made or by the omission of any entry from the register under this Act, or if default is made, or unnecessary delay takes place in making any entry in the register, any person aggrieved

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by such entry, omission, default, or delay may apply to the Court in the prescribed manner for an order that the register may be rectified, and the Court may either refuse such application with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register."

Sect. 97: "The registrar shall obey the order of any competent Court in relation to any registered land on being served with such order or an official copy thereof."

Sect. 98: "Subject to the provisions in this Act contained with respect to registered dispositions for valuable consideration, any disposition of land or of a charge on land which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner."

The Land Transfer Act, 1897 (60 & 61 Vict. c. 65):—

Sect. 7: "(1.) Where any error or omission is made in the register, or where any entry in the register is made or procured by or in pursuance of fraud or mistake, and the error, omission, or entry is not capable of rectification under the principal Act, any person suffering loss thereby shall be entitled to be indemnified in the manner in this Act provided.

"(2.) Provided that where a registered disposition would if unregistered be absolutely void, or where the effect of such error, omission, or entry, would be to deprive a person of land of which he is in possession, or in receipt of the rents and profits, the register shall be rectified and the person suffering loss by the rectification shall be entitled to the indemnity.

"(3.) A person shall not be entitled to indemnity for any loss where he

has caused or substantially contributed to the loss by his act, neglect, or default, and the omission to register a sufficient caution, notice, inhibition, or other restriction to protect a mortgage by deposit or other equitable interest, or any estate or interest created under s. 49 of the principal Act, shall be deemed neglect within the meaning of this subsection.

"(4.) Where the register is rectified under the principal Act by reason of fraud or mistake which has occurred in a registered disposition for valuable consideration, and which the grantee was not aware of and could not by the exercise of reasonable care have discovered, the person suffering loss by the rectification shall likewise be entitled to indemnity under this section.

"(5.) The registrar may, if the applicant desires it, and subject to an appeal to the Court, determine whether a right to indemnity has arisen under this section, and, if so, award indemnity. In the event of an appeal to the Court, the applicant shall not be required to pay any costs except his own, even if unsuccessful, unless the Court shall consider that the appeal is unreasonable.

"(6.) Where indemnity is paid for a loss, the registrar, on behalf of the Crown, shall be entitled to recover the amount paid from any person who has caused or substantially contributed to the loss by his act, neglect, or default.

"(7.) A claim for indemnity under this section shall be deemed a simple contract debt, and for the purposes of the Limitation Act, 1623, the cause of action shall be deemed to arise at the time when the claimant knows, or but for his own default might know, of the existence of his



claim. This section shall apply to the Crown in like manner as it applies to a private person."

Sect. 21: "(1.) For the purpose of providing indemnity payable under this Act, there shall be established an insurance fund to be raised by setting apart at the end of each financial year such portion of the receipts from fees taken in the land registry as the Lord Chancellor and the Treasury shall by order determine.

"(2.) The insurance fund shall be

invested in such names and manner as the Treasury from time to time direct.

"(3.) If the insurance fund is at any time insufficient to pay indemnity for any loss chargeable thereon, the deficiency shall be charged on and paid out of the Consolidated Fund of the United Kingdom, or the growing produce thereof; but any sum so paid out of the Consolidated Fund, or the growing produce thereof, shall be repaid out of the money subsequently standing to the credit of the insurance fund."

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*Landlord and Tenant—Derogation from Grant—Light—Trespass—Party Wall—User of External Wall as Party Wall—Architect—Scope of Authority—London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 5, sub-s. 15, 16; s. 59, sub-s. 1.*

The plaintiffs were lessees from the defendants of a plot of land which at the date of the lease was partially covered with buildings and was occupied by the defendants together with the adjoining property as business premises, and the lease contained a covenant by the plaintiffs to build on the demised land a warehouse according to approved plans which shewed that the back wall of the warehouse was to contain certain windows on the first floor overlooking the defendants' premises. The defendants, in pursuance of a collateral agreement to clear the demised land of buildings, demolished one end of a cart shed which stood partly on the demised land and partly on the land reserved by the defendants, but they left remaining certain stanchions and roof beams, which slightly projected over the plaintiffs' boundary and which were eventually built into the back wall of the warehouse under a verbal agreement between the plaintiffs' architect and the defendants. The architect was employed to superintend the building of the warehouse in accordance with the approved plans, and the agreement was made without the express authority or knowledge of the plaintiffs. The wall was built entirely on the demised land. Subsequently the plaintiffs were called upon by the local authority to block up the windows in the back wall on the ground that the building in of the stanchions and

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roof beams had converted it into a party wall within the meaning of the London Building Act, 1894. In an action for an injunction to restrain the defendants from using this wall as a party wall :—

*Held*, that during the continuance of the lease the plaintiffs were entitled by implied grant as against the defendants to an unqualified right to the access of light coming through the windows in question ; that the agreement was beyond the scope of the architect's authority ; and that the user of the wall by the defendants as a party wall constituted a derogation from their grant and a trespass ; and the defendants were ordered to disconnect their buildings from the wall.

#### TRIAL OF ACTION.

This was an action for an injunction to restrain the defendants from using the walls of a warehouse erected by the plaintiffs on land demised to them by the defendants as party walls within the meaning of the London Building Act, 1894.

The plaintiffs were merchants of builders' materials. The defendants were the well-known carriers. The plaintiffs were lessees from the defendants under a lease dated October 28, 1903, of a plot of land situate in Long Lane, Bermondsey, which at the date of the lease, as shewn by the plan annexed thereto, was partially covered with outbuildings, and was used by the defendants together with the adjoining property as a depot. The lease contained a covenant by the plaintiffs that they would within seven months from the date of the lease build a warehouse on the demised land according to plans to be approved by the defendants, and also a covenant by the defendants for quiet enjoyment. Before the granting of the lease the plaintiffs submitted to the defendants for approval certain plans which shewed that the whole of the first floor of the warehouse was designed as a show-room having three windows in the south or back wall overlooking the defendants' premises, there being no windows at the back in the ground floor of the warehouse. The defendants at first objected to these windows, but after some negotiation they ultimately approved the plans. By a collateral agreement the defendants undertook to clear the demised land of buildings. At the date of the lease there stood partly on the demised land and partly on the land reserved by the defendants a very large covered yard or cart shed, and in order to clear the demised land the defendants demolished the northern end of this shed ; but the part of the shed which they left standing slightly overlapped

the demised premises in the following particulars, viz., the ends of several of the roof timbers projected over the boundary line by about three inches, and two iron stanchions which formerly contributed to the support of the roof stood upon the demised land also for about three inches. When the south wall of the plaintiffs' warehouse was being erected the plaintiffs' architect, Mr. Webb, without the express authority of the plaintiffs and, as the Court found, without their knowledge, verbally agreed with the defendants' architect that these projecting roof beams and stanchions should be built into the wall, and they were built in accordingly.

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On October 15, 1904, the plaintiffs were served by the district surveyor with a notice under the London Building Act, 1894, alleging that the warehouse was not in conformity with the provisions of the Act and in effect requiring the plaintiffs to brick up all the three windows in the south wall. On October 31, 1904, the plaintiffs were summoned for non-compliance with this notice, and at the hearing of the summons the magistrate in the course of the argument expressed his opinion that the south wall of the warehouse, so far as it was covered by the defendants' shed or extended within three feet above the roof of the shed, was a party wall, and intimated that he was prepared to hold that the two easternmost of the three first floor windows in the south wall, or such parts thereof as were within three feet of the roof-line of the defendants' shed, must be blocked up by the plaintiffs, but ultimately he adjourned the summons pending the trial of this action, which the plaintiffs undertook to commence. The plaintiffs alleged that, if the proposed order were made, the blocking up of these windows in accordance with such order would render their show-room wholly unfit for use as a show-room.

Since the commencement of the action the plaintiffs discovered that the defendants were using the east wall of the warehouse on the basement floor as the wall of their stables, which were underground. These stables were in existence at the date of the building of the wall. The walls of the warehouse were built entirely on the plaintiffs' land as external walls.

The plaintiffs claimed : (1.) An injunction to restrain the

KEKEWICH defendants from committing any trespass on the walls of the warehouse and from using these walls as party walls; (2.) a mandatory injunction requiring the defendants to disconnect their buildings from the plaintiffs' walls; (3.) an injunction to restrain the defendants from preventing the plaintiffs from enjoying the lights of the back of the warehouse according to the terms of the lease, and a mandatory injunction requiring the defendants to pull down any erections which interfered with such enjoyment; (4.) damages.

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The defendants, among other defences, set up the agreement between the architects as an answer to the action. The plaintiffs denied that the agreement was within the scope of their architect's authority. The terms of Webb's employment, so far as appeared from the evidence, were that he was to draw out plans of the proposed warehouse and to superintend the building of the warehouse according to the approved plans.

After the case had been opened and the evidence closed the learned judge ordered it to stand over in order to give the defendants an opportunity of further arguing the question of the architect's authority.

*P. O. Lawrence, K.C., and R. J. Parker, for the plaintiffs.* The object of the action is to restrain the defendants from continuing to use the plaintiffs' wall as a party wall within the meaning of the London Building Act, 1894, since the effect of that user will be to prevent the plaintiffs from having any window in their warehouse within three feet of the part of the wall used as a party wall. The definition of "party wall" in s. 5, sub-s. 16, includes "a wall forming part of a building and used . . . for separation of adjoining buildings." Therefore a wall may become a party wall by user as a party wall irrespective of the ownership of the wall, and on the cesser of such user it will cease to be a party wall. It has, however, been held that a wall used as a party wall is not necessarily a party wall for its whole height, but is a party wall only to the extent of the user and, in the case of a warehouse, for such height above the roof of the adjoining building as will give a distance of at least three feet measured at right angles to the slope of the roof: *Drury v. Army and*



*Navy Auxiliary Co-operative Supply, Ltd.* (1) We cannot dispute that the windows of the show-rooms, or some of them, are within three feet of the defendants' roof, or that they are not such openings as are authorized by the Act to be made in a party wall. We say, first, that the defendants' user of this wall to our injury is a derogation from their grant and a trespass: *Aldin v. Latimer Clark, Muirhead & Co.* (2); *Bailey v. Icke* (3); *Ray v. Hazeldine* (4); secondly, that the blocking up of these lights is a breach of the covenant for quiet enjoyment. The defendants set up a parol agreement by the plaintiffs' architect to allow the overlapping stanchions and roof timbers to be built into the wall, but the alleged agreement was beyond the scope of the architect's authority, and assuming it to be proved it was made without consideration, and merely amounted to a revocable licence. The defendants must say that they are entitled to an easement to use this wall as a party wall, but such an easement could only be obtained by reservation in the lease or by a separate deed of grant. It cannot be conferred by parol.

*Stewart-Smith, K.C.*, and *B. J. Leverson*, for the defendants. It is said that the plaintiffs by virtue of the grant of their lease are entitled to an implied easement to the lights in their warehouse and that the defendants have derogated from their grant, but it is submitted that the plaintiffs have not an absolute, but a modified implied easement. The plaintiffs' wall was intended throughout to be a dividing wall, and there was no suggestion that the defendants should build a new wall to support their adjoining buildings. The plaintiffs must have known that their wall was to be the only wall separating their premises from the defendants', and in measuring the extent of the implied easement regard must be had to the surrounding circumstances: *Birmingham, Dudley and District Banking Co. v. Ross*. (5) The result is that the plaintiffs' easement to light is subject to the liability of their windows being blocked up by the local authority for not conforming with the requirements of the London Building Act as to party walls. Further, derogation from one's grant implies some

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(1) [1896] 2 Q. B. 271.

(3) (1891) 64 L. T. 789.

(2) [1894] 2 Ch. 437.

(4) [1904] 2 Ch. 17.

(5) (1888) 38 Ch. D. 295.

KEKEWICH J. act on the part of the grantor: see *Aldin v. Latimer Clark, Muirhead & Co.* (1); but here the defendants have done nothing. Then, as to trespass, the alleged trespass is the act of the plaintiffs themselves done by their agent in the ordinary course of his authority. The architect had authority to superintend the building according to the plans, and, there being nothing in the plans to shew how this wall was to be built, it was within the scope of his general authority to arrange with the defendants that these obstructions should be built into the wall instead of requiring them to be removed. It is now too late to insist upon their removal. Then it is said that this agreement between the architects was nothing more than a revocable licence, and that a deed was required; but a beneficial licence to be exercised upon land may be granted without deed, and if acted upon it cannot be revoked: *Taylor v. Waters.* (2) As to the alleged breach of the covenant for quiet enjoyment, there has been no such direct interference by the defendants with the enjoyment of the demised premises as to constitute a breach within the authorities: *Davis v. Town Properties Investment Corporation, Ltd.* (3)

*P. O. Lawrence, K.C.*, in reply, was relieved by the Court from arguing as to the extent of the implied easement, and as to the architect's authority, but was heard on the rest of the case.

KEKEWICH J. There is no occasion to go at length into the facts of this case, but a brief statement as to how the question arises is perhaps necessary.

The plaintiffs are lessees of the defendants under a deed of October 28, 1903, which is a lease of land described by reference to a plan shewing that it had at that time some buildings on it, and that lease contains a covenant by the lessees to erect buildings of a certain description according to approved plans. Those plans shew a certain number of windows. We know from the evidence that the plaintiffs stipulated for those windows, and that they stipulated for them for a certain purpose, and that the defendants knew why that stipulation was made. But I put that aside, because it is sufficient for me to know—at least

(1) [1894] 2 Ch. 437.

(2) (1817) 7 Taunt. 374.

(3) [1903] 1 Ch. 797.

so it seems to me—that as a matter of fact the bargain between the two parties was that the plaintiffs should erect buildings containing certain windows. Windows were an essential part of the approved plans, and therefore I think the purpose for which the windows were required—I mean the special purpose—becomes immaterial.

It is said that the defendants have acted in derogation of that grant, and especially as regards the grant of the right to open those windows and of the privilege of having light coming through them. They have, so the plaintiffs say, converted what ought to have been an external wall into a party wall within the meaning of s. 5, sub-s. 16, of the London Building Act, 1894, and the result of that is that the local authority are competent to demand, and do demand, that these windows shall be shut up, and that they must come out of the plan. It is unnecessary to go into the question of the foundation of the local authority's demand, except that they say—apparently with some justification—that if this wall is used as a party wall these windows cannot be allowed to remain.

Now the defendants' main answer shall be postponed for a moment; but assuming that they have really used a wall as a party wall where a party wall ought not to be, then they have led directly to the local authority's demand, which must be complied with, and in that way they seem to have acted in derogation of their grant.

There are many authorities on this point, but I will take the general law as stated by Stirling J. in his judgment in *Aldin v. Latimer Clark, Muirhead & Co.* (1) After reviewing the authorities on the subject he says: "The result of these judgments appears to me to be that where a landlord demises part of his property for carrying on a particular business, he is bound to abstain from doing anything on the remaining portion which would render the demised premises unfit for carrying on such business in the way in which it is ordinarily carried on." I can only apply the principle of that language to the present case.

There are several answers to that on the part of the defendants. The first is that you must regard any alleged derogation from

(1) [1894] 2 Ch. 437, 444.

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the grant with reference to the circumstances under which the grant was made, and for that *Birmingham, Dudley and District Banking Co. v. Ross* (1) was cited, and it does establish that proposition. What the defendants say is this: The plaintiffs accepted this lease with the obligation to build according to the plans, knowing that they were bound to build a wall separating the demised premises from the adjoining premises retained by the lessors, and they must be taken to have known that other buildings were to be erected by the defendants in the place of those which were then standing, and that the separating wall would, at any rate, in all probability, become a party wall; and that if it were a party wall the consequence would follow that these windows, which were, so to speak, guaranteed to them, could not be erected. It seems to me that that is pressing the doctrine of *Birmingham, Dudley and District Banking Co. v. Ross* (1) a great deal too far. In the first place, I am not sure that the plaintiffs ought to be treated as contemplating the existence of a party wall. All that they knew was that they were going to build a wall containing their own premises. They might have also contemplated, and I will take it that they did contemplate, that the defendants would erect buildings in the place of those then standing, with or without alteration, but I see no reason for concluding that the plaintiffs knew or reasonably contemplated that the defendants' buildings would have their containing wall the same as the containing wall of the plaintiffs, so as to make it a party wall. But even if that were so, and if they ought to be regarded as having had that in contemplation, it does not seem to me to follow that they ought to have reasoned thus: "There may be, and probably will be, a party wall. If there is, all our plans will be upset; the windows for which we have stipulated will have to come down, because in the London Building Act there is a provision which enables the local authority to shut up windows in a party wall." It seems to me that that is carrying the doctrine of obligation construed by circumstances a great deal too far.

The next defence on the part of the defendants is this: "We have done nothing. The principle which Stirling J. in *Aldin v.*

(1) 38 Ch. D. 295.



*Latimer Clark, Muirhead & Co.* (1) enunciates is that you must do nothing in derogation of your grant—that is the ordinary form of expressing it—but we have done nothing at all. We did not bring the stanchions and roof beams on to the plaintiffs’ ground, we simply left them there. We did not clear them away, and with the consent of the plaintiffs’ architect we allowed them to be built into their wall. Having done nothing, we cannot be treated either as derogating from our grant or as trespassers.” The answer to that, to my mind, is: “You have done, and are doing, a great deal. You are, as a matter of fact, using the property which is demised to the plaintiffs, and occupying it with your stanchions and roof beams, and you have no right to do that.”

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That seems to me to be quite as much an act as if the defendants had brought these things on the land. I am not speaking for the moment of their not having removed them, which they ought to have done, of course, under the collateral agreement; but they have used, and are using, the plaintiffs’ property for unauthorized purposes, and that seems to me to be a trespass which the Court can remedy.

Then it is said, “If we did do it, we did it with authority,” and in support of that they rely upon Mr. Webb’s evidence. I am not finding fault with Mr. Webb, because he thought, no doubt, that he was acting within his authority. He was the architect of the plaintiffs, and it does not matter whether the request came from the defendants’ architect or from Mr. Webb, but between them they agreed that these roof beams and stanchions should be built into the wall, and Mr. Webb, purporting to act on behalf of the plaintiffs, allowed that to be done. It is clear upon the evidence that he did not communicate this to the plaintiffs, and they did not find it out until some time afterwards. Was that within the scope of an architect’s authority? It seems to me it clearly was not. What is within the scope of an architect’s authority I am not called upon to say; but I will say this much, that I apprehend his authority is strictly limited by the terms of his employment. So far as I know, in this case the architect was simply employed to superintend the erection

(1) [1894] 2 Ch. 437, 444.

KEKEWICH of the buildings. That, I take it, he has done, but that cannot possibly give him any implied authority to allow these stanchions and roof beams to be built into the wall. He could not even have allowed, according to the constitution of the employment, the slightest deviation from the plans. His only duty was to superintend the erection according to the plans which had been approved. Of course, we know that in many cases the architect has certain powers given him as to verifying the builder's work and certifying the result, and you may find that all that comes within his authority; and indeed there may be, and probably are, many details which would be implied in those provisions; but beyond that it is impossible to say that an architect has any more authority than any other person who is employed to superintend work. His duty, to sum it up in a word, is to superintend and nothing more.

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There remains one other important question. This wall, which has been conveniently spoken of in the argument as being divided into two parts, but is really one wall with a turn, has been trespassed on, as I have held, by the including in it and building into it certain roof beams and stanchions, and that makes it, I apprehend, a party wall. It is therefore used as a party wall within the Act. That is the case made by the local authority, and I am assuming that the local authority are perfectly right, and are entitled to insist on the shutting up of the windows if the wall is used as a party wall. But it has been used also as a party wall in a different way. So far we have dealt with it above the ground, but down below the ground, in the basement, it is still the separating or external wall of the plaintiffs, that is to say, the wall separating the demised premises from the premises retained by the lessors. But down below the ground, on the other side of the wall, there are stables used by the defendants, and they have no other wall on that side of their stables but this, and they have used this wall as the wall between their stables and the plaintiffs' premises, the wall being still on the plaintiffs' ground. That may or may not—again I am not deciding that—make it a party wall, and if it is a party wall down there it may or may not be a party wall up above in consequence. I am not dealing with that question, but I will assume that in using it in

that way the defendants are using it as a party wall. What right had the defendants to use that as a party wall? It is the external wall built by the plaintiffs on their own ground. If the defendants desire to use the adjoining premises for stables or for any other purpose they can erect their own containing wall ; they have no business to use the wall of the plaintiffs, and it seems to me that they are doing that, and that there again they are using as a party wall what they have no business to use as a party wall. The only answer to that is that it has always been a party wall from the first brick that was laid until now. That is quite possible, and I think it is very likely, but the defendants have not brought home to the plaintiffs any knowledge of that, and as soon as the plaintiffs knew it they protested and said it must not be used in that way. So that whether it was used from first to last or not seems to me to be immaterial.

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Then there is a question raised about the breach of the covenant for quiet enjoyment in the lease. I do not see myself that there has been any breach of the covenant for quiet enjoyment, but I need say no more about that, because if I give the plaintiffs the relief which they ask on the other grounds that, no doubt, will suffice.

There will be a perpetual injunction restraining the defendants from committing any trespass on the walls of the plaintiffs' warehouse and from using any part of the walls as a party wall, and an order that the defendants do within one month from the service thereof remove the stanchions and roof beams so far as they stand upon or overlap the plaintiffs' premises, and there will be also an inquiry as to damages. The defendants to pay the costs of the action down to and including the trial.

Solicitors: *Peake, Bird, Collins & Co.; Upton & Co.*

H. B. H.

KEKEWICH LAW GUARANTEE AND TRUST SOCIETY, LIMITED v.  
 J. MITCHAM AND CHEAM BREWERY COMPANY,  
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 LIMITED.

April 30;  
 May 1.  
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[1906 M. 549.]

*Licensing Acts—Compensation—Refusal to Renew Licence—Mortgagor and Mortgagee—Trust Deed—Leaseholds—Parties interested—Licensing Act, 1904 (4 Edw. 7, c. 23), s. 2.*

Where a company has specifically mortgaged leaseholds to trustees to secure debenture stock, the trustees will be entitled to receive the compensation money awarded to the company under the Licensing Act, 1904, in respect of the refusal of the licensing authority to renew the licence of a leasehold beer-house included in the security; but the mortgagors, being in possession, will be entitled to the interest received in respect of the investment of such compensation money, until the security becomes enforceable.

By a trust deed dated March 3, 1899, and made between the defendant brewery company of the one part and the plaintiff trust society of the other part, being an indenture for securing first mortgage debenture stock issued by the company for 75,000*l.* and interest thereon, it was (inter alia) provided to the following effect:—

By clause 2 the company covenanted with the trust society in the event mentioned to pay to the debenture stockholders the nominal amount of the stock, with an additional amount equal to 10 per cent., and in the meantime interest on the said nominal amount.

By clause 4 the company conveyed to the trust society the freehold hereditaments described in the first schedule thereto, and the goodwill of the business carried on upon or in connection with the same premises, or any part thereof, or upon or in connection with the hereditaments described or referred to in the second and third schedules, to hold, as to the freeholds, to “the use of the” trust society in fee simple, subject to subsisting leases and tenancies, and as to the goodwill absolutely.

By clause 5 the company devised to the trust society all the leasehold lands and hereditaments described in the second



schedule, to hold to the trust society for all the respective residues then unexpired of the several terms for which the same were respectively granted (except as to each such term the last day thereof) and subject as therein mentioned; and by clause 7 the company declared that they would stand possessed of the several nominal reversions reserved of the original terms, in trust for the trust society, subject as therein mentioned.

By clause 8 the company charged in favour of the trust society all their other property, rights, and assets for the time being, including uncalled capital, and their undertaking, with the payment of all principal moneys and interest covenanted to be paid by the company, such charge as to all freehold, copyhold, or leasehold hereditaments to be a fixed charge, but as to all other premises affected thereby to be and rank as a floating charge, and accordingly such charge should in no way hinder or prevent the company from selling, alienating, mortgaging, disposing of or dealing with their property (other than freehold, copyhold, or leasehold) as if they were absolute owners thereof.

Under clause 13 the trust society was to permit the company to hold and enjoy all the premises thereby specifically mortgaged and to receive the rents and profits thereof, and to carry on thereon and therewith the business, or any of the businesses authorized by the memorandum of association of the company, until the security thereby constituted became enforceable. Clause 14 stated the events in which the security would become enforceable; and clauses 22 and 23 gave power to the trust society to sell any of the mortgaged premises, and provided for the investing of the proceeds arising therefrom.

By clause 38 the company undertook to conduct their business in a proper manner, and to keep the licences for carrying on the sale of intoxicating liquors upon the mortgaged premises insured, to the satisfaction of the trust society, against loss or refusal; and for payment to the trust society of all moneys to be received by virtue of any insurance of a licence, to the intent that the same might be applied in the same manner as moneys arising from a sale.

The second schedule to the deed contained a description of numerous leasehold public houses, including one known as the

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Running Horse beer-house, in Austin Road, Battersea, in the county of London, held for a term of twenty-one years from December 25, 1894, at a rent of 50*l.* a year. By a deed of April 24, 1903, a further lease of the Running Horse was granted to the company for twenty-one years from December 25, 1915, and this lease was demised to the trust society for the residue of the term (less the last day) and upon the trusts of the deed of March 3, 1899.

The licensing authority under the Licensing Act, 1904, refused to renew the licence of the Running Horse, and the amount of compensation awarded to the company in respect of this house was 1133*l.*, which included 25*l.* for depreciation of trade fixtures.

The trust society was not present at the discussion before the compensation authority when this amount of compensation was determined, as they considered that the company represented their interests.

It appeared from an affidavit of Mr. J. S. Motion, who valued the Running Horse on behalf of the brewery company, that he assessed the total amount payable at 1536*l.* 5*s.* in respect of (i.) loss of profits on sale of beer at ten years' purchase; (ii.) depreciation in value of fixtures; (iii.) loss of rent and reconstruction of premises to adapt them as a private house.

The compensation authority finally assessed the total amount of compensation at 1510*l.*, of which they awarded the company 1133*l.* as their proportion: 272*l.* was awarded to the owner of the freehold property, and 105*l.* to the licensee. The company claimed to retain this sum of 1133*l.*, while the trust society claimed that it should be paid to them.

The question now raised upon an originating summons was whether by virtue of the said trust deed the plaintiff society were entitled to a specific charge on this sum of 1133*l.*

*P. O. Lawrence, K.C.*, and *E. Beaumont*, for the plaintiff society. The whole of the 1133*l.* is payable to the plaintiff society as mortgagees. This beer-house and the goodwill were comprised in their security, and the compensation money is part of the house and included in the specific charge in the deed.

The trust society are persons interested in the licensed premises within s. 2, sub-s. 2, of the Licensing Act, 1904, and the licensing rules made thereunder, although they have not been registered as mortgagees in pursuance of the Act. It is immaterial that they did not appear before the compensation authority. If a sale had taken place under clause 22 of the deed the proceeds would have gone to the mortgagees.

[KEKEWICH J. referred to the case of *Martin v. London, Chatham and Dover Ry. Co.* (1)]

This compensation money is part and parcel of the specifically mortgaged property, and it has been depreciated by the refusal to renew the licence. The floating charge created by the 8th clause of the deed does not affect this question, and does not help the mortgagees. The only question is whether this money is payable to the mortgagee or the mortgagor. There is nothing in the deed to say what is to be done with compensation money such as this, as it was not contemplated that any would be received. Under clause 13 of the deed the company would be entitled to have the income from it. It is in an analogous position to that of money obtained from any sale under clauses 22 and 23, or derived from an insurance of licences under clause 38, which would go to the mortgagees: *Pile v. Pile* (2); *King v. Midland Ry. Co.* (3); Lloyd on Compensation, 6th ed. p. 85.

*Stewart-Smith, K.C.*, and *P. B. Abraham*, for the defendants. The question is whether this compensation money is caught by the words of the specific charge in the deed. The Licensing Act gives the mortgagees no interest in it, they are not entitled to anything under it, and the case turns upon the construction of the contract between the mortgagor and mortgagee. The licence to sell excisable liquors attaches to the individual who carries on the business, and not really to the premises; that is shewn by s. 2, sub-s. 2, of the Act, which provides that the claim to compensation is to be regarded partly by the conduct of the licenceholder, and the length of time during which he has been the holder of a licence. The Act does not attach the compensation

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(1) (1865) L. R. 1 Eq. 145; (1866) L. R. 1 Ch. 501.

(2) (1876) 3 Ch. D. 36.

(3) (1868) 17 W. R. 113,

KEKEWICH to the premises, or substitute it for the premises; it is only the measure by which the compensation may be regulated. The cases cited arose under the provisions of the Lands Clauses Act, and are distinguishable from the present on other grounds. In *Pile v. Pile* (1) the mortgagee was in possession. So also in *King v. Midland Ry. Co.* (2) The mortgagee here has never entered into possession, as the security is not enforceable, and this sum cannot be considered a part of the goodwill of the premises: *In re Bennett*. (3) The analogy of the proceeds of sale under clause 23 and of moneys from insurance of licence under clause 38 is against the plaintiffs. It shews that in those two cases the deed provides that the money is to be paid over to the trust society, but those are the only cases contemplated by the deed. Where a deed such as this has provided in terms for two contingencies, and for no others, it must be construed according to its precise terms, and cannot be enlarged to meet a case which was not in the contemplation of the parties when the contract was made. Here the contract does not apply to the case which has occurred. There is no hardship in the money of the debenture-holders being employed in the business. This money is assets of the company, it is covered by the floating charge, and can be dealt with by the company under clause 8. The Court is asked on the other side to hold that this money is leasehold property and cannot be dealt with by the company. But it is merely something in the nature of a windfall, and by clause 13 the company are entitled to receive it and to carry on their business "therewith."

No reply was called for.

KEKEWICH J. In this case the contractual relations between the parties are determined by the deed of 1899, whereas the question has now arisen respecting a sum of money produced by the intervention of the Legislature in 1904. The consequence is that it is extremely difficult to apply the deed which defines these contractual relations to the facts which have now to be dealt with. That deed is one made in the ordinary form for the creation of a

(1) 3 Ch. D. 36.

(2) 17 W. R. 113.

(3) [1899] 1 Ch. 316.



charge, through the medium of trustees, for the benefit of the debenture-holders, and it assigns, or strictly speaking sub-demises, certain leasehold property to trustees upon trust for the benefit of the debenture-holders. This sub-demise is in the ordinary form for the remainder of the term less one day, and the deed declares that the defendant company shall be trustees of that remaining day for the benefit of the trustees, so that for all practical purposes the trustees are the owners of the lease, which is still vested in them as mortgagees, while the equity of redemption is in the company. The property, however, is not what it was. Something has been taken out of it. In truth, a restriction has been put upon the use of it. The leasehold property was assigned as property upon which the business of a licensed victualler could be carried on. Now the licence has been taken away, and it has become a leasehold property which can be used for any purpose other than that of a licensed victualler. The restriction has been put upon the house, and it is in respect of that restriction that compensation money has been awarded. That is the practical result of what has happened under the Act of 1904. It has been necessary for the consideration of this case for counsel to go into certain sections of the Act and to refer to some of the rules made under the Act. But really I am not concerned with any construction of the Act; I have not to consider what was the policy and scope of the Act or how it is carried into effect. Under the provisions of the Act certain authorities are enabled to refuse a licence which up to that time had been granted in respect of the particular premises in question, and to assess compensation to those interested in them; and it provides also for the payment of the compensation when so assessed.

Again, I am not now concerned in respect of any distribution of this compensation. In this particular instance there were three classes interested, the freeholder, the licensee, and the lessees, but I have nothing to do with the two former of these. It is in respect of the lessees that this money has been paid. Now it is important to see for what the money has been paid, because some of the cases which have been referred to speak of the goodwill, and it has also been mentioned in the course of the argument. The affidavit of Mr. Motion, the valuer called

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KEKEWICH in on behalf of the company, shews exactly for what the money has been paid. He valued the Running Horse as it was and as it would be, and he assessed the compensation on that footing. He speaks of the loss of profits, the depreciation in value of the fixtures, and the loss of rent because the premises would not be let at so high a figure. What he assessed was the difference of its value as a licensed house and its value as an unlicensed house, or one to which no licence could be attached. That runs through the rest of the affidavit, and is the ground of the amount of the compensation awarded, which, in this case, was rather less than that at first claimed. The sum eventually fixed was 1133*l.*, that being the amount to be paid to those who represented the company, either the defendants themselves or those claiming through them. If that is the correct view, what does this money represent? Not the whole value of the property, but the difference between the former value of the property and its present value with this restriction placed upon it, between the value of the house as it stands and as it stood before the intervention of the licensing authority. If that is so, it seems to me that it must be paid to those to whom the property belongs. It is never safe to trust analogies too far. But a sale of property under compulsory powers is very near to the events which have occurred here. It might have been a purchase under the Lands Clauses Act or under Michael Angelo Taylor's Act, and a purchase under those Acts is really similar to what has been done here. Under the Licensing Act of 1904 the proper authority is entitled to say, "You shall release certain advantages of your house, and for those you ought to be paid." It is really a compulsory purchase of part of the premises, though not really a physical part. This money is really part of the house, but cannot be called goodwill. I am now considering the mortgagor's claim, and how can the mortgagor be entitled to money which represents that which he has assigned away? It is impossible to say that he is so entitled; it is not his property. He had no intention, of course, that the mortgagees should receive this money, but the words of the deed must be applied to circumstances which were not contemplated, and so applied they do not entitle the mortgagor to come in and claim this as his money.

Can he claim it under the provisions of the floating charge, which is given by clause 8 of the deed? The first observation upon that is that this particular property is an exception from the floating charge. The charge in favour of the trustees was of "all their other property, rights, &c.," and everything in that clause which refers to the floating charge deals with the property other than that specifically demised to the trustees. This sum in question does not come within the floating charge.

The practical difficulty is what is to be done with this money. The trustees are mortgagees in that they hold this property, including the proceeds of sale, as security for money which is not yet due; they are not entitled to apply it in reducing the amount of their mortgage, nor are they entitled to use it in any way. If the deed had contemplated what has actually happened, no doubt some provision might have easily been made for it, but I think that the mortgagors cannot receive it and the mortgagees cannot use it when they have got it. The only thing I can do is to decide the matter on principle. None of the provisions in the deed assist me, because, although there are elaborate provisions dealing with what arises under clause 23, they are only applicable to a sale under clause 22. The present compensation money does not arise in that way, but upon an entirely different state of things. On principle it seems to me that the mortgagees are entitled to receive it, but I think that the mortgagors, being still, as a matter of fact, in possession according to law, are entitled to the usufruct of it, that is, any money arising from the investment of it is to be paid to the mortgagors. There is not much difficulty in expressing that, but what occurs to me as more difficult is to say how long that is to continue, because at any moment the right of the trustees to enter may occur, and they may be entitled to sell and to exercise the rights of mortgagees in possession; and directly they do that, the relative positions will be entirely altered, and the mortgagees will be entitled to enforce their remedies against this money as comprised in their security.

There will therefore be a declaration that the company are not entitled to retain this money, and it must be paid to the

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KEKEWICH trustees, but so that they shall not apply it in redemption of their mortgage debt or otherwise; and the company are entitled to any dividends arising from investments thereof until the security becomes enforceable.

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Solicitors: *Gribble, Oddie, Sinclair & Johnson; William Brewer.*

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# ATTORNEY-GENERAL v. DE WINTON.

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[1904 A. 1457.]

*April 4, 5, 7. Local Government—Municipal Corporation—Urban Authority—Borrowing Powers exhausted—Illegal borrowing—Overdraft at Bankers—Interest on Overdraft—Borough Funds—Illegal Payments—Audited Accounts—Borough Treasurer—His Duty and Liability—Certiorari—Injunction—Parties—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 18—21, 25—28, 106, 119, 139—144, 240, Sched. V., Part 1, Sched. VIII.—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 6, 189, 198, 209, 210, 233—237, 245—247, 265.*

A borough which was governed by the Municipal Corporations Act, 1882, and was also an urban authority under the Public Health Act, 1875, had in March, 1903, exhausted all its borrowing powers and had in addition a large fluctuating overdraft at its bankers in respect of expenses previously incurred. The borough kept its banking account in the name of its treasurer, and during 1903 and 1904 the bank charged interest quarterly on the overdraft, and the treasurer in his accounts with the borough debited the borough and credited himself with the charges for interest, and his accounts were audited under ss. 25—28 of the Municipal Corporations Act, 1882, by the borough auditors, who passed the charges for interest, and the audited accounts were submitted to and approved by the borough council. In an action against the treasurer by the Attorney-General, suing on relation of a burgess, impeaching his accounts in respect of the charges for interest on the overdraft and claiming an injunction to restrain him from making any further payments for such interest out of the borough funds:—

*Held*, that the corporation were not necessary parties to the action, as no relief was asked for against them.

*Held*, also, that the treasurer was not merely the servant of the council, but, as custodian of the borough funds, owed a duty and stood in a fiduciary position to the burgesses as a body, and could not plead the orders of the council for an unlawful act.



Dictum of Erle J. in *Reg. v. Saunders*, (1854) 24 L. J. (M.C.) 45, applied.

*Held*, also (following *Smith v. Southampton Corporation*, [1902] 2 K. B. 244), that the overdraft and the payments of interest thereon were illegal, and that the plaintiffs were entitled to the injunction notwithstanding that the payments might be quashed by certiorari under s. 141, sub-s. 2, of the Municipal Corporations Act, 1882, or by appeal to quarter sessions against the rates.

*Held*, also, that the fact that the defendant's accounts had been audited under the Act was no bar to the action, there being nothing in the Act which made such audit finally binding and conclusive on the borough and the burgesses.

*Held*, also, that the defendant could not retain the charges for interest by way of his remuneration under s. 20 of the Municipal Corporations Act, no remuneration in fact having been voted to him by the council.

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### ACTION.

This was an action by the Attorney-General on the relation of C. F. Egerton Allen, and by the relator, against the treasurer of the borough of Tenby, claiming a declaration that certain payments made by him as such treasurer or charged by him against the borough in his accounts as such treasurer as and by way of interest on certain overdrafts granted to the borough by their bankers or by the defendant were illegal and to the knowledge of the defendant beyond the powers of the borough and a breach of trust, and also claiming an injunction to restrain the defendant from making any further payments out of the borough funds by way of interest upon the overdrafts.

The relator was a burgess and town councillor of the borough of Tenby. The borough were a municipal corporation governed by the Municipal Corporations Act, 1882, and as such kept a borough funds account; and were under s. 6 of the Public Health Act, 1875, and subject to that Act, the urban authority and the water authority for the borough, and as such kept a district rate account and a water rate account; and were also by virtue of certain special Pier and Harbour Acts and Orders the harbour authority for Tenby, and kept a harbour account and some subsidiary accounts.

The borough kept their banking account in the name of their treasurer for the time being, and on July 6, 1903, the defendant was by a resolution of the town council duly appointed the

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treasurer of the borough in succession to a Mr. Cross within the meaning of s. 18 of the Municipal Corporations Act, 1882, and s. 189 of the Public Health Act, 1875. At this date the borough had exhausted all their borrowing powers under their general Acts and also under their special Acts and Orders, and had, in addition, overdrawn their said accounts at their bankers standing in the name of Mr. Cross to the extent of 4956*l*. On July 17, 1903, the borough auditors certified that the amount then due to Mr. Cross was 4969*l*., and on July 23, 1903, the town council passed the following resolution: "That Lloyd's Bank, Limited, at Haverfordwest being the bankers of the corporation be and are hereby authorized to honour all cheques drawn on the treasurer, whether the account be in credit or overdrawn, signed by any three members of the town council for the time being and counter-signed by the town clerk, and to accept the indorsement of the said town clerk upon all cheques to the credit of the account, and that the authority be given under the common seal."

Under this resolution several cheques, amounting altogether to 4969*l*., were drawn on the defendant as borough treasurer, and by this means the accounts standing overdrawn in the name of Mr. Cross were cleared and transferred into the name of the defendant as the borough treasurer. On March 31, 1904, which was the end of the financial year, these overdrafts, which fluctuated from day to day, amounted to the following sums, viz.:

|                                   | £     | s. | d.     |
|-----------------------------------|-------|----|--------|
| (a) Harbour Account . . . .       | 2651  | 3  | 11     |
| (b) District Rate Account . . . . | 1442  | 4  | 6      |
| (c) Water Rate Account . . . .    | 535   | 12 | 6      |
|                                   | <hr/> |    |        |
|                                   | £4629 | 0  | 11 (1) |
|                                   | <hr/> |    |        |

These overdrafts continued, and on June 18, 1904, amounted to 5975*l*., and on September 26, 1904 (the date of the issue of the writ in the action), stood at 3707*l*.

(1) This figure was admitted by the defendant in his answer to interrogatories to be correct, but in his audited accounts for the year ending March 31, 1904, the amount was stated to be 4510*l*. 3*s*. 11*d*.

Item (a) represented moneys borrowed in excess of the powers conferred on the borough by its special Acts and Orders. Items (b) and (c), or such other sums as from time to time represented the same, were borrowed from the bank without the sanction of the Local Government Board, and consisted in whole or in part of expenditure incurred at such dates that it was not competent to the borough to include the amounts thereof in the general district rates made from time to time under s. 210 of the Public Health Act, 1875, in order to raise money for the payment of charges and expenses incurred at any time within six months before the making of the rate. Between July 23, 1903, and September 26, 1904, the bank charged interest at the rate of  $4\frac{1}{2}$  per cent. on these three overdrawn accounts standing in the name of the defendant, as borough treasurer, quarterly on September 30, December 31, March 31, and June 30, and the defendant in his accounts as borough treasurer credited himself and debited the borough with these quarterly sums of interest. The total of the sums of interest so paid or charged for the period from July 23, 1903, to June 30, 1904, amounted to 215*l.* 5*s.* 6*d.* No order within the meaning of s. 141 of the Municipal Corporations Act, 1882, for payment of this interest had ever been made by the borough council. On May 10, 1904, the relator gave the defendant, as borough treasurer, notice not to pay any cheque drawn on him by the town council, the effect of the payment of which would be to increase the amount of money overdrawn by the town council on any account. Subsequent applications by the relator to the defendant for information meeting with unsatisfactory replies, this action was commenced. The plaintiffs alleged that it was the practice of the borough to defray the interest on overdrafts from time to time paid or charged as aforesaid, as regards the overdraft on harbour account by means of pier and harbour rents, rates and tolls, as regards the overdraft on the district rate account by general district rates, and as regards the overdraft on water rate account by water rates; that the defendant had at all material times been cognizant of and concurred in this practice, and threatened and intended to continue such practice; and they claimed a declaration and injunction as above stated.

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The defendant pleaded that in overdrawing the said accounts of the borough at the bank and in paying the said interest he acted bona fide as the servant and by order of the town council for the purpose of executing the Municipal Corporations Act, 1882, and the Public Health Act, 1875, and he relied on s. 265 of the Public Health Act, 1875, and s. 1 of the Public Authorities Protection Act, 1893, as a defence to the action. He also relied on the fact that his accounts as treasurer during the period in question had been audited by the borough auditors, and that the auditors had allowed the said sums of interest, amounting to 215*l.* 5*s.* 6*d.*, and that the audited accounts had been submitted to and approved of by the town council. He also claimed, as treasurer of the borough, to be entitled to remuneration under s. 20 of the Municipal Corporations Act, 1882, and to be allowed the said sums, amounting to 215*l.* 5*s.* 6*d.*, as his remuneration during the said period.

It appeared that during the year 1905 item (a) above mentioned had been paid off by a special rate levied the previous year under the provisions of the Tenby Pier and Landing Stage Order, 1902, and items (b) and (c) had also been almost, if not entirely, discharged. No imputation was made against the defendant personally, the questions raised being purely points of law.

*Upjohn, K.C.*, and *E. G. Palmer*, for the plaintiffs. It is admitted that large sums were due by the borough for advances, and that interest was charged quarterly at the rate alleged. The question is whether the defendant is entitled to debit the borough with these quarterly sums of interest in his accounts as borough treasurer.

[FARWELL J. Why should I make a declaration as to any specific sums when no account is or can be asked for in the action against the corporation?]

We are not asking for an account or for payment against the defendant, but for an injunction against further payments. If we get a declaration that these charges are illegal, we can then go to the Attorney-General and obtain leave to bring an action against the corporation. These overdrafts by the borough during the



period in question were only a form of borrowing, and, being in excess of their statutory powers, were illegal. They were also improper because the borough did not comply with their statutory provisions. Their borrowing powers under the Municipal Corporations Act, 1882, are prescribed by ss. 106, 119, 240 and forms in the Eighth schedule, and under the Public Health Act by ss. 233—237, which authorize the raising of loans and rates by mortgage under seal of the borough property and rates; and their special Acts and Orders also contain special provisions as to raising money, and statutory powers for raising money must be strictly followed: per Bayley J. in *Richter v. Hughes*. (1) All these statutory powers are quite inconsistent with borrowing by overdraft, and therefore this overdraft was unauthorized and the interest charged thereon illegal. In *Reg. v. Reed* (2) it was held that a school board had no power to borrow a temporary loan at its bankers by way of overdraft. The present case is not unlike *Smith v. Southampton Corporation* (3), where a rate levied to pay expenses incurred beyond the six months limited by s. 210 of the Public Health Act was held bad. Here the rates made during the period in question to pay this overdraft were illegal. The audited accounts state that on March 31, 1904, the sum of 4510*l.* 3*s.* 11*d.* was due to the defendant, and it is for him to shew that that is a legal debt in respect of which interest is chargeable. Further, ss. 245—248 of the Public Health Act provide a complete code for the audit of the accounts of a local authority, but those provisions do not apply here, because the borough accounts are audited under ss. 25—28 of the Municipal Corporations Act, which appear rather inefficient, and, subject to the remarks of Lord Russell C.J. in *Thomas v. Devonport Corporation* (4), give no power to surcharge illegal items as in the Public Health Act. Next, the defendant relies on s. 265 of the Public Health Act, but that section does not apply here, first, because we are asking for an injunction to restrain payments for the future; secondly, because the section only relates to things done under the Act, and a charge for interest on an overdraft not authorized by the Act is not a thing done under the Act; and,

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(1) (1824) 2 B. & C. 499, 505.

(2) (1880) 5 Q. B. D. 483, 487.

(3) [1902] 2 K. B. 244.

(4) [1900] 1 Q. B. 16.

FARWELL J. thirdly, because it is contrary to his duty to do what is not in accordance with law.

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[FARWELL J. Is there any authority for suing the borough treasurer alone in a case like this?]

The action is based on the dictum of Erle J. in *Reg. v. Saunders* (1), that, if an order be made on a county treasurer to pay expenses wholly disconnected with county matters, it would be his duty to disobey it. The same principle applies here. Sects. 18 to 21 and s. 142 of the Municipal Corporations Act deal with the appointment and duties of the borough treasurer, and where, as here, the borough is an urban authority, he is also by ss. 189 and 195 of the Public Health Act the treasurer of the urban authority. Under both Acts he is a statutory officer with statutory duties. He is not merely a servant of the council, but the custodian of the borough funds, which is a trust fund, and it is his duty not to part with them except on proper authority.

[FARWELL J. Could you before the Judicature Act have brought this action at common law?]

Probably not, but it is submitted that a bill in Chancery could have been brought to restrain the treasurer from dealing with the borough funds in a way not authorized. He stands in a fiduciary position towards the burgesses and the borough, and owes a duty to them which can only be enforced by the Attorney-General suing either on relation or ex officio.

*R. C. Glen and Bethune (Macmorran, K.C., with them)*, for the defendant. The action is misconceived and brought against the wrong party. The action alleges that certain proceedings of the corporation are illegal, and the relief asked affects the corporation. The defendant is only a servant of the corporation, and under both Acts he holds office at the pleasure of the council and is liable to be dismissed at any moment. It is the corporation who have a duty to the borough, and, if any order or payment is improper, they are the parties to be made defendants to the action and to be restrained if an injunction lies. But the proper remedy for an illegal payment or order is by writ of certiorari under s. 141 of the Municipal Corporations Act, or by an appeal to quarter sessions.

[FARWELL J. The objection here is that the defendant has paid himself these sums of interest out of the borough funds.]

There is no evidence that he has paid himself the interest out of the borough funds. He has not had the money. It is the bank who charged the interest against the account of the corporation in its ledger. Further, the defendant's accounts containing these alleged improper payments have all been audited by the borough auditors, who passed the payments, and the audited accounts have been before the corporation and have been allowed by them. Therefore all these payments have been ratified and sanctioned by the corporation, and that is final as between the corporation and the treasurer, and the remedy of the ratepayers for any improper payment is against the corporation, and not against the treasurer, who owes no duty to the ratepayers. The case of *Reg. v. Saunders* (1) is distinguishable. There the justices had no corporate capacity, and the county treasurer was appointed under a special Act. He had an independent existence very different to that of the treasurer of a municipal corporation like this. But if this interest was received by the defendant, then we contend that it was by way of his remuneration under s. 20. By Sched. V., Part 1, no order for his remuneration is required, nor is there anything in the Act which requires the council to pass an antecedent resolution for his remuneration. The bank gets the interest that is charged on the overdrafts, and the charges are placed by the treasurer in his accounts against the corporation, and if the figures come before them and are allowed by them then that, we submit, is a sufficient resolution for his remuneration under s. 20. Some of the quarterly payments of interest, as audited in the borough accounts, were made more than six months before the action, and as to them the defendant claims the benefit of s. 1 of the Public Authorities Protection Act, 1893; and, so far as an injunction is claimed against future payments, there is no evidence that the defendant intends to continue to make the payments. Lastly, we admit that the overdrafts cannot be justified unless they were authorized. The harbour account was in its initial stage unauthorized, but the special Order of 1902

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(1) 24 L. J. (M.C.) 45, 48.

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recognized it and directed it to be discharged. It then ceased to be an illegal borrowing, and has since been paid off by the rate levied under the Order. On the other accounts there was by necessity a continuous overdraft which existed when the defendant became treasurer, and the analogy of *Lawford v. Billericay Rural Council* (1) and that class of cases, which decide that the contracts not under seal of a corporation can be enforced for an executed consideration, applies. Channell J. in *Smith v. Southampton Corporation* (2) points out that a corporation can borrow by overdraft from its bankers for temporary purposes within the limits of its powers, and it cannot be said that we have exhausted our powers, i.e., the limit of value under s. 234 of the Public Health Act.

No reply was called for.

*Cur. adv. vult.*

April 7. FARWELL J. This is an action by the Attorney-General on the relation of a burgess and town councillor of the borough of Tenby against the defendant, who is the treasurer of the borough, an office to which he was appointed on July 6, 1903, and the object of the action is to impeach the accounts of the defendant so far as they relate to payments for interest with which the defendant has credited himself and debited the borough funds, and to restrain similar charges in the future. The facts are not in dispute. When the defendant was appointed the borough had exhausted its borrowing powers, and had, in addition, an overdraft with its bankers of 4956*l.*, which had increased to 5975*l.* by June 18, 1904. The writ in this action was issued on September 26, 1904. During the period between July 6, 1903, and the issue of the writ the borough had accounts of their borough fund under the Municipal Corporations Act, 1882, and of their district rates and water rates under the Public Health Act, 1875, and of harbour and pier rates under private Acts and Orders; all these accounts fluctuated from time to time, but were always overdrawn to some extent, and on all of them the defendant has debited the borough and credited himself with interest at 4½ per cent., with quarterly rests. The

(1) [1903] 1 K. B. 772.

(2) [1902] 2 K. B. 244, 254.



plaintiff does not ask for any order for payment; none of the sums have in fact been paid, but he asks for a declaration that they are improperly debited to the borough in the treasurer's account, and for an injunction to restrain similar debits in the future.

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The defendant takes the objection at the Bar that the corporation are necessary parties to the action. The suit is, no doubt, somewhat unusual, but no claim is made against the corporation; they will not be bound by any decision in this action, and their interests are not likely to be prejudiced by any lack of information on the defendant's part, inasmuch as the town clerk happens to be the defendant's solicitor in the action. If the plaintiff succeeds the borough benefits; if he fails it is no worse off than before. I therefore overrule this objection.

The defendant's next contention is that he is not personally liable, that the overdrafts and interest thereon were made and debited by the order of the corporation, and that he merely acted as their servant. I am of opinion that this contention is not well founded. The question before me relates to the funds collected by and on behalf of the borough for public purposes under the Municipal Corporations Act and the Public Health Act, and the private Harbour Acts, and it has been settled, at any rate since Lord Cottenham's decision in *Attorney-General v. Aspinall* (1), that property held for public purposes is held upon charitable trusts, and, to quote his words: "If the property in question be subject to any public trust, and if the appropriation complained of be not consistent with such trust, but for purposes foreign to it, and if there be not, in the Municipal Corporations Act" (now the Act of 1882), "any provision taking from the Court its ordinary jurisdiction in such cases, then it will follow that the Attorney-General has, under the circumstances stated, a right to file the information, and to pray that the fund may be recalled, secured, and applied for the public, or in other words, charitable purposes, to which it is by the Act devoted." I have recently had to consider this case in *Stevens v. Chown* (2), and I will merely say that I remain of the opinion there expressed, and all the more

(1) (1837) 2 My. & Cr. 613, 618

(2) [1901] 1 Ch. 894.

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so because it has been approved by Lord Lindley in *Yorkshire Miners' Association v. Howden*. (1) It is plain, therefore, that this Court would have jurisdiction to restrain the borough from misapplying these funds on the ground of breach of trust: *Attorney-General v. Newcastle-upon-Tyne Corporation*. (2) But the defendant is their treasurer, and knows that the moneys which he has credited to himself are trust moneys, and he is clearly amenable to the jurisdiction of the Court, and cannot escape by pleading the wrongful orders of his employers. There is no question of repaying here; but even if there were, the defendant knew that this was a trust fund, and "those who know that a fund is a trust fund cannot take possession of that fund for their own private benefit, except at the risk of being liable to refund it in the event of the trust being broken by the payment": per Fry J., *Foxton v. Manchester and Liverpool District Banking Co.* (3) But the treasurer is not a mere servant of the council: he owes a duty and stands in a fiduciary relation to the burgesses as a body; he is the treasurer of the borough (s. 18); all payments to and out of the borough fund must be paid to and by him (s. 142); he has to account to three auditors, two appointed by the burgesses and one by the mayor (s. 25), and although he holds office during the pleasure of the council only (s. 18), this does not enable him to plead the orders of the council as an excuse for an unlawful act. In my opinion the observations of Erle J. in *Reg. v. Saunders* (4), with relation to a county treasurer, apply with equal force to a treasurer under the Municipal Corporations Act: "If an order be made on a county treasurer to pay expenses wholly disconnected with county matters, such an order is without jurisdiction, and one which the treasurer would be bound to disobey; and if the treasurer did pay it, it would be the duty of the quarter sessions not to allow the items of such expenses in the treasurer's account."

It was next contended by one of the defendant's counsel that the overdrafts were not illegal on some suggested analogy to the class of contracts that may bind a corporation, although

(1) [1905] A. C. 256, 280.

(2) (1889) 23 Q. B. D. 492.

(3) (1881) 44 L. T. 406, 408.

(4) 24 L. J. (M.C.) 45, 48.

not under seal; but the borrowing powers of the borough in this case are subject to statutory conditions, restrictions, and prohibitions, and these cannot be dispensed with. As Bayley J. says in *Richter v. Hughes* (1): "The Act of Parliament, therefore, gives a special power, and that power ought to be strictly followed, and as it authorizes them to borrow a certain sum of money, and afterwards, by rates, to pay the interest of the money borrowed, they have no right to borrow beyond the specified amount, or to raise rates to pay interest upon any higher sum": see *Baroness Wenlock v. River Dee Co.* (2) In the present case the borough has not merely overdrawn from time to time, but they have a normal floating debt, as appears from their resolution of July 23 set out in the statement of claim, limited only by their creditors' willingness to advance. This case is to my mind indistinguishable in principle from the decision of the Divisional Court in *Smith v. Southampton Corporation*. (3) In that case a borough council in their estimate for a general district rate for the borough included items which consisted of debts contracted in former years, and which had from year to year been carried to a "suspense account" opened for that purpose, and a balance due for works executed in previous years. The council from time to time paid these old debts by money borrowed from their bank by overdrafts, but, so far as the ratepayers were concerned, the items remained unpaid so long as they appeared in the suspense account. The appellant appealed against the rate made under s. 210 of the Public Health Act, 1875, on the ground that it contained charges incurred more than six months before the making of the rate, and it was held that the rate was bad. The Lord Chief Justice says (4): "It was contended that they had borrowed from their bankers and had by that means paid their tradesmen; that the whole had become a debt due to the bank, and that it must be assumed that the rate was raised to meet that debt. But if that argument were allowed to prevail, it would only be necessary to borrow money from the bankers to pay the debts in order to defeat altogether the provisions of s. 210." Then Channell J. explains clearly the

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(1) 2 B. & C. 499, 505.

(3) [1902] 2 K. B. 244.

(2) (1885) 10 App. Cas. 354.

(4) Ibid. 251.

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true ground on which a ratepayer is entitled to complain. He says (1): "I should like to point out what is the real meaning of the objection that a rate is retrospective, which I think this rate clearly was. It means that any ratepayer is entitled to say that he is being charged with a sum which ought to have been charged upon and paid by the ratepayers in previous years. The principle is that these bodies are only entitled to charge upon future ratepayers present expenditure so far as they have statutory borrowing powers; the effect of their borrowing powers is to enable them to charge instalments of present expenditure upon future ratepayers, and borrowing powers are granted upon the understanding that the capital expenditure benefits the future ratepayers. Subject, therefore, to their borrowing powers, corporations and bodies of this character have no right to charge future ratepayers with present expenditure." I can see no ground for holding the overdrafts in the present case to be lawful, still less for allowing the treasurer to credit himself at the expense of the borough funds with  $4\frac{1}{2}$  per cent. interest thereon with quarterly rests.

The next objection was that the Act had provided the remedy, namely, by certiorari, or there could be an appeal against the rate. This is really disposed of by the judgment in *Attorney-General v. Aspinall* (2), but the very point has been recently dealt with in the House of Lords in *Tynemouth Corporation v. Attorney-General* (3), where Lord Morris says: "It is said, however, that there is a special mode of testing the validity of all orders of the council by the provisions of s. 141, sub-s. 2, enabling any order to be removed into the Queen's Bench Division by certiorari, and that consequently this is the only mode of interfering with or controverting any order of the council for a payment, however illegal. I cannot adopt that view. While the Queen's Bench Division is given full authority over every order of the council, it is not enacted, or suggested in the enactment, that that is to be the sole remedy, nor is there anything to deprive the Attorney-General, at the relation of a party interested, of the power of obtaining by injunction an

(1) [1902] 2 K. B. 253.

(2) 2 My. &amp; Cr. 613, 618.

(3) [1899] A. C. 293, 305.



order to restrain the payment of money being made under an order of the council, for which order there was no legal warrant."

The defendant's next contention is that the accounts have been audited under the Act, and that the plaintiff cannot question such audit. My attention has not been called to any section making such audit finally binding and conclusive on the borough and the burgesses thereof, and it would be very unfortunate if there were any such, for the audit provided by the Municipal Corporations Act is quite ineffective. Under the Public Health Act, s. 247, the Legislature provided a system of audit which gives auditors extensive powers, including powers to surcharge, but s. 246 exempts urban authorities who are the council of a borough from this liability, and the Municipal Corporations Act, 1882, s. 27, merely provides that the auditors shall audit the accounts, without more. They have no power to surcharge, and even if they ought, as Lord Russell C.J. says in *Thomas v. Devonport Corporation* (1), to make public any illegal payments by report to the council and the burgesses, this is a duty of imperfect obligation; there is nothing to compel them to do so, and very little to induce them, and so far as I know they have not done anything of the sort in the present case. It is difficult to understand why the Legislature in 1882 should have authorized a system of auditing which is quite illusory when they had seven years before created an efficient method. I certainly see no reason for holding that such an audit as has been put in evidence in the present case, which does not even state that the books and vouchers are correct, but merely that "there is a total overdraft of 4510*l.* 3*s.* 11*d.* on the 31st of March, 1904," is a bar to proceedings against the treasurer to disallow some of the items which go to make up that overdraft.

The defendant suggested that he might retain the items objected to by way of remuneration; but no evidence has been given to shew that the council have ever voted him any remuneration, and the Court is not asked to make any order for payment, but merely to declare that certain items charged as interest on overdrafts are wrong.

(1) [1900] 1 Q. B. 16, 21.

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There is a subsidiary point that arises on the harbour account. It is said that the overdraft has been recognized by the Provisional Order of 1902, and I will assume that this is so. But that order merely directs a larger rate than had been formerly lawful to be raised for the purpose of discharging the overdraft. It made no provision for the payment of interest on it. Indeed, the council failed to obtain permission of the Local Government Board to borrow the money which would have enabled them to pay interest, and this Provisional Order is the best permission that they could obtain instead of it. It is plain that there is nothing in this order to justify the defendant in charging interest on the deficit. It is fair to the defendant to say that no imputation of personal misconduct is made against him; the litigation and the preliminary correspondence have been conducted on courteous and even friendly terms with a view to ascertaining legal rights. I propose to make a declaration that the defendant is not entitled to credit himself or to debit any of the borough funds with interest on any of the overdrafts appearing in the accounts heretofore put in by him as treasurer since his appointment. If the defendant will state by his counsel at the Bar that he will not make any similar charges in future, I will accept his statement in lieu of granting an injunction and give liberty to apply instead. Although by his letters before action he has, in my opinion, threatened and intended to continue to do so in such a way as to justify an injunction, I see no reason to suppose that he will not abide by the decision of the Court now that the question has been decided; and there would be a practical inconvenience in framing an injunction, because some restriction of the generality of the words in the declaration would be necessary in providing for the future. All overdrafts are in effect borrowings: *Cunliffe Brooks & Co. v. Blackburn and District Benefit Building Society* (1); but if the borough obtain further powers of borrowing in the future, they may be in a position to obtain overdrafts within the limits of those powers for daily necessities as pointed out by Channell J. in *Smith v. Southampton Corporation* (2), and this would have to be provided for by way of exception from

(1) (1884) 9 App. Cas. 857.

(2) [1902] 2 K. B. 244, 254.

the injunction. The defendant must pay the costs of the FARWELL action.

Solicitors for plaintiffs: *Baker & Co.*

Solicitors for defendant: *Smith, Rundell & Co., for G. L. Stokes, Tenby.*

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WHITEHORNE v. BEST.

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April 27.

[1906 W. 231.]

*Will—Gifts to Testator's Son and his Children—Revocation by Codicil of Benefit to Son—Effect on Children's Interests.*

Testator by his will gave his business to trustees upon trust to carry it on for the benefit of his four sons, including G., until the youngest attained twenty-one, with power to employ any of them, for reward, as manager or otherwise, and subject as aforesaid in trust for the sons equally when the youngest attained twenty-one, and he declared that if, on the determination of the trusts as to the business, any son should be dead or unwilling to carry it on, any of the other sons were to be entitled to purchase his share.

By paragraph 6 of the will the trustees and the sons, while respectively carrying on the business, were to be entitled to use the property on which it was carried on for that purpose at a specified rent; and G. was to be entitled to occupy a house, 133, W. Road, at a fixed rent. These rents were payable to the testator's widow for life, and after her death to two of his daughters during spinsterhood. Subject as aforesaid both properties were devised to the trustees to be held upon trust as to one-fourth share for G. for life, and after his death for his children in fee simple.

By a codicil reciting that testator had reasons for dissatisfaction with G., that he had ceased to employ him in his business, and that G. had at testator's desire ceased to occupy 133, W. Road, testator revoked the trust for permitting G. to occupy that house, and proceeded to revoke "each and every devise, bequest, gift and legacy contained in my said will to or for the benefit of my same son," and to revoke and annul "every provision and benefit thereby given made or intended to or for him," and to direct that "every clause of my said will purporting to entitle him to share any part or parts of my estate, or of the proceeds, income or profits thereof with any other person or persons shall be construed, and the directions and trusts thereof shall be carried out, as if the name of my said son G. had never appeared therein."

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Testator also by the codicil directed that G. should not be appointed manager of or employed in the business, and left a legacy of 500*l.* in trust for the children of G. at twenty-one or marriage, and for their maintenance in the meantime, but directed that the trustees should not pay any income of the legacy to G. pursuant to s. 43 of the Conveyancing and Law of Property Act, 1881:—

*Held*, that the revocation extended only to the benefits given by the will to G.; that the interests thereby given to G.'s children were not revoked; but that the children's interests were accelerated and that the children were in addition entitled to the legacy of 500*l.*

*Green v. Tribe*, (1878) 27 W. R. 39, and *Alt v. Gregory*, (1856) 8 D. M. & G. 221, followed.

*Tabor v. Prentice*, (1884) 32 W. R. 872, distinguished.

GEORGE WHITEHORNE, of Wandsworth Road, Surrey, made a will, dated March 14, 1894, and divided into numbered paragraphs.

By paragraph 4 the testator gave his business of a wholesale tin-plate manufacturer to trustees, upon trust to carry it on for the benefit of "my four sons, George William, Alfred, Frederick, and Edward James," in equal shares until the youngest of them for the time being should attain twenty-one, with liberty to employ any of the sons in the business, as manager or otherwise, at such remuneration as the trustees should think proper. Subject as aforesaid, the business was to be held in trust for the four sons in equal shares, and to be made over to them when the youngest attained twenty-one.

By paragraph 5, if, upon the determination of the trusts as to carrying on of the business, any of the sons should be unwilling to join in carrying it on or should be dead, any of the other sons who should desire to carry it on should be entitled to purchase the share and interest in the business of the son so deceased or unwilling to carry on the business.

By paragraph 6 the testator gave the freehold property, No. 131, Wandsworth Road, to the trustees, upon trust to use and occupy, for the purpose of the business, so long as they carried it on, the part used for that purpose by the testator, and further to permit his sons to occupy that part for the same purpose so long as they or any of them should carry on the business, at a yearly rent of 200*l.*, payable to the trustees, and on condition of paying the rates, taxes, and other outgoings, and keeping the



property in repair and insured. And the testator also devised a freehold house, No. 133, Wandsworth Road, then in the occupation of his son George William, to his trustees, upon trust to permit that son to reside there at a yearly rent of 30*l.*, subject to similar conditions as to outgoings, repair and insurance. Both the rents were to be paid to the testator's widow for her life, and on her death the rent of 30*l.* was to be paid to the testator's two unmarried daughters, Annie and Catherine, equally until marriage. Subject as aforesaid, both of the freehold properties were to be held upon trust as to one equal fourth part or share for George William for life, with power to him by deed or will to appoint the income to his widow on his death for her life or any shorter period, and subject thereto in trust for his children in fee simple, in equal shares if more than one.

The will continued: "And upon trust, as to the other three several fourth parts or shares of the said premises for my other three sons, Alfred, Frederick, and Edward James respectively for life and for their respective children or child, and with the like power of appointment in favour of any widow in manner corresponding in all respects with the trusts hereinbefore declared with reference to the share of my said son George William and his children and child."

The residuary gift was for the benefit of the testator's three daughters, Sarah Ebdon, Annie Whitehorne, and Catherine Whitehorne.

The testator made a codicil dated July 31, 1894, and divided into numbered paragraphs.

Paragraph 1 was as follows: "Whereas I have reasons for dissatisfaction with my son George William Whitehorne, and I have ceased to employ him in my business, and he has by my desire ceased to occupy my house, No. 133, Wandsworth Road, now therefore I revoke the trust contained in the 6th paragraph of my will for permitting my said son to occupy the said house so long as he shall desire, and I hereby also revoke each and every devise, bequest, gift, and legacy contained in my said will to or for the benefit of my same son, and I revoke and annul every provision and benefit thereby given, made, or intended to or for him. And I further direct that every clause of my said

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BUCKLEY will purporting to entitle him to share any part or parts of my  
J. estate, or of the proceeds, income, or profits thereof with any  
1906 other person or persons shall be construed, and the directions and  
WHITE- trusts thereof shall be carried out as if the name of my said son,  
HORNE, George William Whitehorne, had never appeared therein. And  
*In re.* I direct that my same son shall not at any time be appointed  
WHITE- manager of my business, or employed therein, nor become  
HORNE a trustee of my will.”  
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By paragraph 2 the testator directed his executors to set apart out of his residuary estate and invest the sum of 500*l.* and hold the investments upon trust to apply, in equal shares, the income for the maintenance, or education or benefit of all the children, living at the testator's death, of G. W. Whitehorne, until twenty-one or marriage, and then to transfer to them their shares in the 500*l.* But the testator declared that his executors should not pay the income of such legacy or any part of it to “G. W. Whitehorne pursuant to s. 43 of the Conveyancing and Law of Property Act, 1881.”

By paragraph 3 the executors were authorized to release any debt due to the testator from G. W. Whitehorne, and any claim by the testator on his estate without payment, and to give up to him any promissory notes or other security held by the testator for the same.

The testator died on October 12, 1894, and his widow died on February 20, 1895.

G. W. Whitehorne died in 1897, leaving three children, all born before the date of the will, and without appointing any interest to his widow. The business and freehold property were sold; all the testator's daughters married, and one of them, Sarah Ebdon, purchased the interests under the will of the testator's sons, Alfred and Frederick. The youngest son had attained the age of twenty-one years.

An originating summons was taken out by the children of G. W. Whitehorne for the determination of the questions—  
(a) whether, on the true construction of the will and codicil, the trustees held one-fourth share of the freehold property devised by the will, or alternatively of the proceeds of sale thereof, on trust for the plaintiffs in equal shares on their

attaining the age of twenty-one years, or whether the one-fourth share fell into and formed part of the residuary estate; and (b) whether the 500*l.* directed by the codicil to be set apart for the benefit of the plaintiffs was in addition to or in substitution for the one-fourth share, the subject of the previous question.

*Buckmaster, K.C.*, and *W. H. Stevenson*, for the plaintiffs. The codicil only revoked the gifts made by the will to *G. W. Whitehorne*, leaving the gifts to his children unaffected, except that they were accelerated by the revocation of the gifts in favour of their father: *Green v. Tribe*. (1) In that case *Fry J.* decided that there was no revocation of the gifts in remainder to children, although those supporting the other view cited *Philipps v. Allen* (2), *Boulcott v. Boulcott* (3), and *Sanford v. Sanford*. (4) [They also referred to *Tabor v. Prentice*. (5)]

[*BUCKLEY J.* referred to *Ramsay v. Shelmerdine* (6) and *Alt v. Gregory*. (7)]

*J. A. Hay*, for the trustees of the will.

*Maw*, for two of the daughters of the testator. The codicil contains separate revocations, as regards *G. W. Whitehorne*, of all gifts "to" him, and of all gifts "for his benefit." The former refers to gifts by which he was directly benefited. The latter covers the option to purchase a share of the business, the benefit to be derived from being appointed a manager, and everything else by means of which he might be indirectly benefited. If there was no revocation of the children's interests, those gifts would be accelerated by the revocation of their father's interest, and he would be benefited by that, as it would relieve him of the burden of supporting them.

The case which is most in point is *Tabor v. Prentice* (5), where a share was given by will in trust for the testator's son for life and afterwards for his children, and a codicil revoking all gifts thereby made "to or in favour of" the son was held to revoke the gift to the son's children. This testator meant the legacy of

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(1) 27 W. R. 39.

(2) (1835) 7 Sim. 446.

(3) (1853) 2 Drew. 25.

(4) (1847) 1 De G. & Sm. 67.

(5) 32 W. R. 872.

(6) (1865) L. R. 1 Eq. 129.

(7) 8 D. M. & G. 221.

BUCKLEY 500*l.* to be substituted for the interests of the children of  
 J. G. W. Whitehorne under the will, but even in making this gift  
 1906 he was careful to provide that the son should not be benefited by  
 ~~~~~ his children being maintained out of the income. The result is  
 WHITE- that the gifts by will in favour of the children are revoked by the
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Gatey, for the testator's daughter, Sarah Ebdon. The testator meant to cross out of his will the name of George William Whitehorne, so that neither he nor his children should take anything thereunder.

[*Buckmaster, K.C.* The result of that would be that all the gifts in favour of the other brothers and their children in the freeholds would be revoked, as the trusts in their favour are by reference to the trusts declared in respect of George's share.]

The legacy given by the codicil to George's children is in favour of the view that they were to take nothing by the will; it was a substituted gift to them.

BUCKLEY J. The principles which I have to apply are simple. If there is a gift by will, the person who asserts that there is a revocation of that gift by codicil must shew a plain revocation. Further the revocation extends only so far as the will is inconsistent with the codicil. In the present case the will contains gifts to or for the benefit of the testator's son George William, and also gifts for the benefit of that son's children. There is not an original gift to the son with a subsequent direction as to the enjoyment of the property, but there is a gift to trustees in trust for the son for life and after his death for his children. Afterwards the testator made a codicil. Something turns on the recital in the codicil that he had "reasons for dissatisfaction" with his son George, and had ceased to employ him in his business, and that the son had by the testator's desire ceased to occupy a certain house. This is something personal to the son, but has nothing to do with the son's children. Then follows the revocation in words the effect of which I have to consider.

There are three cases—*Philipps v. Allen* (1), *Boulcott v.*

(1) 7 Sim. 446.

Boulcott (1), and *Sanford v. Sanford* (2)—in each of which it was held that not only the gift to the individual but also the subsequent limitations were revoked; but the decisions in those cases turned on their particular circumstances. They do not lay down any general principle. There is also the case of *Tabor v. Prentice* (3), in which it was held that the interests given by the will to the son's children were revoked.

On the other hand, there are two cases—*Green v. Tribe* (4) and *Alt v. Gregory* (5)—in which it was held that the interests given to the children were not revoked; and from these cases I get the principle which is applicable. In *Alt v. Gregory* (6) Turner L.J., after reading the recital in the revoking codicil in that case, says: "The testator there stops in his recital with the gift to his son. Had he meant to alter the disposition in favour of his grandchildren he would have recited that disposition." In the present case the testator has introduced into the codicil a recital shewing an intention as regards his son, but not as regards that son's children, and I gather from that that he did not intend to take away the interests given by the will to the children.

Green v. Tribe (4) is very like the present case. There the testatrix gave a fund upon trust for her niece for life, with remainder to the niece's children, and by codicil revoked "every gift, devise, appointment and bequest made by me in and by my said will to or in favour of my niece." Fry J. held that the revocation extended only to the interest of the niece, and not to the interest of her child, but that the latter interest was accelerated.

In *Tabor v. Prentice* (3), which I mentioned above, Kay J. held that the interest given to the children was revoked, relying principally on the words "to or in favour of" the testator's son in the revoking words of the codicil, and because Knight Bruce L.J. in an unreported case had arrived at that conclusion. In the present case I do not feel pressed by any considerations arising on the words "to or for the benefit of." Some of the

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(1) 2 Drew. 25.

(2) 1 De G. & Sm. 67.

(3) 32 W. R. 872.

(4) 27 W. R. 39.

(5) 8 D. M. & G. 221.

(6) Ibid. 236.

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gifts in the will are to the son and others are for his benefit. The words "to or for the benefit of" are satisfied by there being in the will a power to the trustees to employ the son as a manager and by the option given to him to purchase shares in the business. [His Lordship read the codicil from the words "Now therefore" to the word "therein," and continued:—] It has been argued that the word "clause," as there used, refers to the numbered paragraphs of the will; but that cannot be the true construction, for if it were applied logically, the result would be that the gifts to the other brothers, which are made by reference to the gift in favour of George, would also fail. In my judgment the word "clause" means every sentence of the will by which anything is given to George. Another argument is rested on the direction to the executors not to pay to George the income of the 500*l.* set apart for the maintenance of his children, but there is nothing in that compelling me to arrive at a different conclusion as to the meaning of the codicil.

On the whole will and codicil I hold, on the authority of *Green v. Tribe* (1) and *Alt v. Gregory* (2), that the revocation does not extend to the interests of the children, and that those interests are accelerated. As regards the gift in the codicil of 500*l.*, I hold that it is in addition to the interests given to the children by the will, and not in substitution for them.

Solicitors for the plaintiffs: *Faithfull & Son.*

Solicitors for Sarah Ebdon and the trustees: *Paterson, Candler & Sykes.*

Solicitors for the other daughters of the testator: *Saw & Sons.*

(1) 27 W. R. 39.

(2) 8 D. M. & G. 221.

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Company — Prospectus — Misstatements — Omissions — Property purchased or acquired — Separate Vendors — “ Sub-purchaser ” — Non-disclosure — Director — Liability — Companies Act, 1900 (63 & 64 Vict. c. 48), s. 10, sub-s. 1 (f)—Directors Liability Act, 1890 (53 & 54 Vict. c. 64).

Where a company on its formation purchases or proposes to acquire from an absolute owner property which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, s. 10, sub-s. 1 (f), of the Companies Act, 1900, requires that the name and address of the vendor and the amount of the consideration shall be stated in the prospectus. There is no obligation under the sub-section to disclose the amount of the purchase-money, however small, paid by the vendor on his acquisition of the property, however recent.

If the company buys merely the benefit of a contract for the purchase of property, the consideration for which remains wholly or partly undischarged, and so, pro tanto, a burden on the property, the company acquiring the benefit of the contract is a “ sub-purchaser ” within the meaning of the sub-section, and the particulars thereby required must be stated in the prospectus.

A company is not, generally speaking, a “ sub-purchaser ” for the purposes of the sub-section unless it has to pay purchase-money in some form to some one other than its own vendor, and it is not necessary to state in the prospectus the amount of any consideration paid or to be paid by anyone other than the company.

TRIAL OF ACTION.

The plaintiff in this action alleged that by reason of mis-statements in and omissions from the prospectus of a company called South African Super-Aeration, Limited, he had been induced to subscribe for eighty 1l. shares in that company, which had proved to be worthless. He claimed to recover compensation for his loss from the defendant, who was a director of the company and had issued or authorized the issue of the prospectus.

The company was incorporated on June 1, 1901, with a nominal share capital of 125,000l. in 125,000 shares of 1l. each. The prospectus was issued on the same day. It stated (inter

JOYCE J. alia) as follows : " This company is formed to work and develop the super-aeration system of dispensing aerated waters from bulk in Cape Colony, Natal, Orange River Colony, Transvaal, and Rhodesia, and to acquire the benefit of the applications already made for letters patent for those Colonies in relation thereto, and the exclusive right to the letters patent when granted. By this method, so successfully exploited in the United Kingdom by Super-Aeration, Limited, the very heavy expense of bottling at the factory, corking, wiring, loss in breakages, packing, and handling is avoided, and the cost of distributing reduced to a minimum, whilst the aeration is so perfectly retained that the quality of the water when drawn is equal, if not superior, to that now offered by the best makers of bottled aerated waters."

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" The London company, formed in March last with a nominal capital of 300,000*l.*, was largely over-subscribed, and the shares stand in the market at a substantial premium."

" The following information is given in compliance with the Companies Act, 1900 : The purchase consideration for the rights aforesaid payable by the company under the contract for sale hereinafter mentioned is 58,500*l.*, payable as to 40,000*l.* in cash, and as to 18,500*l.* in cash or fully paid shares of the company, at the option of the directors. . . . The names and addresses of the vendors are as follows : The African Patent Rights, Limited, of No. 39, New Broad Street, London, E.C., has agreed to sell to this company the said rights for the consideration stated out of which they have agreed to pay to the Imperial and Foreign Investments Corporation, Limited, of No. 70, Cornhill, E.C., and the Industrial and Banking Issue Corporation, Limited, of No. 88, Bishopsgate Street, E.C., the issuing house, in equal proportions the sum of 5000*l.* in cash or fully paid shares of the company. . . . The following contracts have been entered into : (1.) A contract dated May 11, 1901, and made between James Anson Wheeler, of the one part, and the African Patent Rights, Limited, of the other part. (2.) A contract dated June 1, 1901, and made between the African Patent Rights, Limited, of the one part and Francis R. Wolseley, as trustee for the company, of the other part, for the purchase

by this company of the rights mentioned, on the terms above stated.” JOYCE J.

Inspection of these documents was offered.

By the statement of claim it was alleged that the prospectus contained material statements in themselves untrue and misleading, and material statements untrue by reason of the suppression of material facts; and in particular it was alleged (*inter alia*) that the prospectus was not in compliance with s. 10 of the Companies Act, 1900, inasmuch as the names and addresses of the vendors of the property proposed to be purchased or acquired by the company and the amounts payable in cash or shares to each vendor were not stated therein as required by sub-s. 1 (*f*) of the said section (1), the company being as the plaintiff alleged a sub-purchaser and there being as the plaintiff also alleged separate vendors of the property within the meaning of the section. The plaintiff claimed a declaration that the defendant was liable to pay to him compensation for the loss sustained by reason of the untrue statements and omissions aforesaid. He also claimed damages for the breach of statutory duty in not complying with the requirements of s. 10 of the Companies Act, 1900.

By his defence the defendant denied that the prospectus contained material statements which were untrue and misleading, and he stated (*inter alia*) that if there was any vendor of the property purchased or acquired, or proposed to be purchased or acquired, by the company within the meaning of s. 10 other than those mentioned in the prospectus, the defendant was not cognizant thereof and honestly believed that there was not. He further pleaded that if the prospectus contained any untrue

(1) Sect. 10, sub-s. 1, provides that “Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, must state . . . (*f*) the names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the

proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of publication of the prospectus, and the amount payable in cash, shares, or debentures, to the vendor, and where there is more than one separate vendor, or the company is a sub-purchaser, the amount so payable to each vendor.”

JOYCE J. statement (which he did not admit), he had reasonable grounds
1906 to believe, and did believe at the time of the allotment to the
BROOKES plaintiff, that such statement was true.

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With regard to the contracts referred to in the prospectus, it appeared that on May 11, 1901, an agreement was entered into between J. A. Wheeler as vendor and The African Patent Rights, Limited, as purchasers, whereby the vendor agreed to sell and the purchaser to purchase the rights of the vendor and one Frank Bracebridge Mills to the grant of protection or letters patent for the Colonies for an invention thus described: "Improvements in apparatus for supplying aerated liquids from bulk on draught" as specified in the patent for the United Kingdom, No. 919 of 1899. It was recited in the deed that applications for letters patent for the said invention were pending in Cape Colony, Natal, Orange River Colony, Transvaal, and Rhodesia. The consideration for this sale was 15,000*l.* to be paid in cash by the purchaser to the vendor, 1000*l.* to be paid on the execution of the agreement, and 14,000*l.* on or before June 17, 1901. In fact, the 14,000*l.* was borrowed by The African Patent Rights, Limited, from a Mr. Wolseley in two sums of 8000*l.* and 6000*l.* and paid over to Wheeler on March 31, 1901.

The second contract was dated June 1, 1901. It was made between The African Patent Rights, Limited, as vendors and Wolseley as trustee for South African Super-Aeration, Limited. It was a contract for the purchase by that company of the benefit of the applications for the said letters patent for the Colonies, and the exclusive right to the same patents when granted, for the sum of 58,500*l.*

Younger, K.C., and *J. Ricardo*, for the plaintiff. The statement in the prospectus that the company was formed to work and develop a system is untrue; there was no system in existence. It did not acquire any patent to manufacture at all.

Again, the statement as to the over-subscription of the London company is untrue. Only 60,000 of the 300,000 shares were issued, and the greater part of that was underwritten, and not subscribed by the public.

But we chiefly rely upon the omission to state in the prospectus

the price paid for the patent rights by the company's vendors and the name and address of the person from whom they acquired the property. There was an immense difference between the price (15,000*l.*) paid by The African Patent Rights, Limited, to Wheeler and the 58,500*l.* paid by the company to The African Patent Rights for the same property.

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The money to pay Wheeler was borrowed from Mr. Wolseley, and was not provided by The African Patent Rights, Limited. Although the purchase-money was paid, the contract was not completed before the issue of the prospectus, as the vendor had to apply for the letters patent. Payment is not the same as completion. The omission to state these particulars is a contravention of s. 10, sub-s. 1 (*f*), of the Companies Act, 1900. The company was in fact a "sub-purchaser" within the meaning of that section, and the amount paid to Wheeler should have been disclosed.

Hughes, K.C., and *J. W. M. Holmes*, for the defendant. There has been no failure to comply with s. 10, sub-s. 1 (*f*). The object of that sub-section is to compel a company to disclose the amount which it is paying for the property it is to acquire. The Act does not require that the prices paid, it may be, by a succession of purchasers under contracts completed before the sale to the company, shall be stated in the prospectus. In this case the whole of Wheeler's purchase-money was paid to him before the incorporation of the company. The sale by him to The African Patent Rights, Limited, was completed, and the company in this case was not a "sub-purchaser" within the section. No part of the purchase-money to be paid by the company was to go to Wheeler or to anyone other than the immediate vendors to the company. He was not, therefore, a separate vendor. When the company's money is going to a vendor, whether it be under one or more contracts, then his name and address must be stated and the amount he is to receive. The section is only directed to such a case. The meaning of the term "sub-purchaser" may be gathered from Davidson's Conveyancing Precedents, 4th ed. vol. ii. Part I. p. 319; Prideaux's Conveyancing Precedents, 17th ed. vol. i. p. 227; Key & Elphinstone's Conveyancing Precedents, 7th ed. vol. i. p. 387, and from the provisions of

JOYCE J. the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 58, sub-ss. 4, 5
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But, apart from this point, the plaintiff is suing for damages, and must, in order to succeed, shew that the alleged non-compliance with the statute was material to him; in other words, that if he had known of the terms of the contract of May 11 he would not have applied for shares: *Macleay v. Tait* (1); *Nash v. Calthorpe*. (2) If it was necessary to shew materiality in those cases, which were under the Act of 1867, a fortiori it is necessary here.

Younger, K.C., in reply. The contract with Wheeler was not completed before the publication of the prospectus. It was certainly material to the plaintiff to know that what the company was giving 58,500*l.* for had been just previously bought for 15,000*l.* Alternatively we submit that the defendant is liable under the Directors Liability Act, 1890: *Greenwood v. Leather Shod Wheel Co.* (3); *Aaron's Reefs, Ltd. v. Twiss*. (4)

Cur. adv. vult.

April 11. JOYCE J. This is an action against a director of the company in respect of certain alleged misstatements and omissions in the prospectus to which the defendant's name was attached as a director. The defendant is a foreigner, born in Denmark, but naturalized in this country, and carrying on business as a merchant in partnership in the City of London and in various places in South Africa. He was a bona fide investor in the company, and his firm in South Africa were to be the general managers of the company in that country, their names being mentioned in the prospectus. His object was not to sell the shares for which he had subscribed, but his interest was in the success and continued prosperity of the company. There is no ground for imputing to him any fraudulent intention. The plaintiff's counsel disclaimed all idea of making any such imputation against him. The defendant appears to me to be an honest and honourable man who believed all the statements in the prospectus whether he had legally sufficient grounds for doing so or not.

(1) [1906] A. C. 24.

(3) [1900] 1 Ch. 421.

(2) [1905] 2 Ch. 237.

(4) [1896] A. C. 273.

Under these circumstances no action for deceit could succeed against him in respect of any misstatements in the prospectus. The plaintiff can only, if at all, establish a claim against the defendant upon the ground of there having been some failure to comply with the provisions of the Companies Act, 1900, or otherwise under the Directors Liability Act of 1890.

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The plaintiff, although formerly a gardener, and now a laundryman, appears to have been not without some experience with respect to investing in joint stock companies. He is the nominee of a committee or body of disappointed shareholders whose meetings he has attended. At those meetings the prospectus has been discussed and all possible objections to it thoroughly canvassed, with the help, no doubt, of legal advisers. The statement of claim, which is somewhat lengthy, contains a formidable indictment against the prospectus embodying, I think, every possible ground of complaint. Of most of these nothing has been heard at the trial, and in support of many that I did hear of no real evidence was adduced. The result of the discussion in Court is that there remain only three grounds of complaint requiring to be seriously considered by me—viz., first and principally, the non-disclosure in the prospectus of the price paid to their vendor by a company called The African Patent Rights, Limited, who were the vendors to the company, South African Super-Aeration, Limited, whose prospectus is in question in this action; secondly, an alleged misstatement in the prospectus in reference to the over-subscription of a company referred to as the London company; and, thirdly, an alleged misstatement in the description of the company's business or of the property it was to acquire.

The first ground of complaint depends upon the true construction of sub-s. 1 (f) of s. 10 of the Act of 1900. Now, the prospectus contains a sufficient statement of the name and address of the vendors to the company and of the full amount payable to such vendors, no consideration being payable or paid by the company to anyone else on account of or in connection with the purchase. But the property proposed to be bought had been purchased by the vendors not long previously from a third

JOYCE J. person, and the purchase-money payable to that person had
1906 in fact been discharged only the day before the issue of the
BROOKES prospectus, when completion of this prior purchase took place
v. pursuant to the terms of the contract between the parties, and
HANSEN. such contract was in truth then completed to all intents and
purposes, so far as was possible, having regard to the nature of
the property, being the benefit of applications for patents in
South Africa not then actually granted.

Where a company is the purchaser of property which, at law as well as in equity, belongs absolutely to the vendor, the sub-section in question requires the publication of the name and address of the vendor and the amount of the consideration. There is no suggestion of any obligation to disclose the amount of the purchase-money, however small, paid by the vendor upon his acquisition of the property, however recent. If what the company buys be merely the benefit of a contract for the purchase of property the consideration for which remains wholly or in part undischarged and so, pro tanto, a burden on the property, the company which acquires the benefit of the contract would properly be termed a sub-purchaser, and the amount payable by the company to the original vendor as well as to their immediate vendor would, under this sub-s. (*f*), have to be stated in the prospectus, and possibly also the name and address of that original vendor as well as of the immediate vendor to the company. Generally speaking, I think that a company is not a sub-purchaser for the purposes of this sub-section unless it has to pay purchase-money (of course I include in that debentures and shares) to someone other than its own vendor, e.g., the vendor or person from whom such immediate vendor purchased. Still, generally speaking, I think the sub-section does not require the statement in a company's prospectus of the amount of any consideration, cash, shares, or debentures, paid or to be paid by anyone other than the company itself. But the whole of the consideration, cash, shares, or debentures, payable to anyone by the company in respect of the purchase or acquisition of property must be stated.

Upon the facts and documents in the present case it does not appear to me that this sub-section required any statement to be

made of the amount of the purchase-money actually paid and discharged by the company's vendors before the issue of the prospectus to the person or persons from whom they bought the property, and the fact that the company's vendors borrowed the money for the purpose of making such payment in my opinion is immaterial. I think the company—South African Super-Aeration, Limited—was not a sub-purchaser within the sub-section. Moreover, all the consideration payable by it was disclosed. In other words, I come to the conclusion that there has been no failure in this case to comply with the provisions of this sub-section. Of course, that being the conclusion, it is not necessary for me to consider what the result would be if I thought there had been a failure to comply with the sub-section.

As to the second ground of complaint, the statement in the prospectus is that "the London company, formed in March last, with a nominal capital of 300,000*l.*, was largely over-subscribed, and the shares stand in the market at a substantial premium," whereas, in fact, the amount of the capital issued for subscription was not the full nominal capital of 300,000*l.*, but only 60,000*l.* Now I do not consider that to be an accurate statement—or, at all events, I think it was likely or not unlikely to mislead a careless reader. But I do not think that the mere statement about the over-subscription was in any way material (and it was admitted by the plaintiff not to be material) if the subsequent statement, viz., that "the shares stand in the market at a substantial premium," be true. That statement was alleged by the plaintiff, but not proved, to be untrue. Upon the evidence before me I think it must be taken to be true. At all events the defendant had, in my opinion, reasonable grounds for believing, and did believe, it to be true.

As to the third and last ground, viz., the misstatement in the description of the property to be acquired, or as to the nature of the business to be carried on, the objects of the company appear by the memorandum of association, printed in the fold of the prospectus, to include a power to manufacture. In my opinion, there was no misstatement in the prospectus of which the plaintiff can reasonably complain either upon this

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JOYCE J. subject or with respect to the property the company was to
 1906 acquire, more especially as all the material documents were
 BROOKES specified in the prospectus and inspection was offered.
 v.
 HANSEN. The action therefore fails, and must be dismissed with costs.

Solicitors: *Joseph Davis; Ingle, Holmes, Sons & Pott.*

G. A. S.

SWINFEN
 EADY J.

In re FULLERTON'S WILL.

[1906 F. 037.]

1906

May 1.

Settled Land—Mining Lease—Right to make up Shorts against future Royalties—Coal required for Support of Reservoir—Lessor's Compensation for Royalties—Capital or Income—Apportionment—Royalties covered by Shorts—Lessee's Rights—Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 6, 22, 25.

The life tenant of a settled estate was entitled to the whole rent and royalties reserved on mining leases. The working of certain coal was stopped by a water authority under s. 22 of the Waterworks Clauses Act, 1847, and the lessee was compensated under s. 25. The lessor's compensation for the acreage royalties that would have been received in the five years necessary to work the coal was assessed under s. 6, and paid into Court:—

Held, as between life-tenant and remainderman, that though the coal would probably have been worked out in the life tenant's life, he was not entitled to immediate payment of the compensation, but that it must be divided into half-yearly instalments in proportion to the coal that would actually have been worked in each half-year and paid or allocated accordingly.

In re Robinson's Settlement Trusts, [1891] 3 Ch. 129, 133, followed.

In re Barrington, (1886) 33 Ch. D. 523, not followed.

Held, also, that as between lessor and lessee a right to make up shorts against future royalties to an amount considerably exceeding the lessor's compensation for the royalties in question did not entitle the lessee to immediate payment of the compensation, but that if he continued working under the lease he would become entitled to each instalment as it accrued.

PETITION.

By his will dated April 20, 1867, John Fullerton devised the Thrybergh Estate in strict settlement, and provided that the life tenant in possession should be entitled to the whole rent and royalties reserved on mining leases.

The testator died on March 6, 1871.

On December 27, 1877, a piece of the land was sold to the Doncaster Corporation for the purpose of constructing a reservoir under the powers of the Doncaster Corporation Waterworks Act, 1873 (36 & 37 Vict. c. cxxix.), which incorporated the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, and also the Waterworks Clauses Acts, 1847 and 1863. The conveyance, which was subject to an existing lease of the coal dated April 14, 1860, did not pass the coal or minerals.

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By a lease of December 1, 1894, made in renewal of a lease of April 14, 1860, the life tenant and certain mortgagees of the inheritance demised certain coal, including the coal under the reservoir, to the petitioners for a term expiring on July 1, 1920. The acreage rent was 240*l.* per acre of coal gotten, and the minimum rent was 2500*l.*, but the lessees were entitled to make up the short gettings or shorts of any year in the subsequent years without paying more than the minimum rent till they were made up.

At the date of this lease the shorts were 12,000*l.*, and this amount was carried forward.

In 1903 the lessees gave the Doncaster Corporation notice of their intention to work the coal under the reservoir.

On June 30, 1903, the corporation gave the lessees a counter-notice under s. 22 of the Waterworks Clauses Act, 1847, to leave it unworked. Compensation was then assessed under ss. 6 and 25. In the ordinary course the coal, amounting to about twelve acres, would have been worked out by unequal instalments in the five years 1904 to 1908. On this basis the lessees' compensation was assessed, under s. 25, at 4914*l.* and duly paid to them. No question arose as to this amount.

The lessor's compensation was assessed, under s. 6, at 2956*l.*, being the total amount of royalties he would have received in unequal instalments spread over the five years. The present value of this amount was agreed at 2620*l.*, and was to bear interest from January 1, 1904.

The lessees claimed this compensation on account of the shorts, which were then about 8000*l.*, and would be increased to 10,956*l.* by the unworkable coal.

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The life tenant and the mortgagees assented, and on a fresh lease of October 11, 1905, expiring July 1, 1940, it was arranged that the lessees should receive the 2620*l.* and give credit for the 2956*l.* against the total shorts of 10,956*l.* and carry forward only 8000*l.* shorts.

The life tenant was only forty-one years old, so that the coal would probably have been gotten in his life, but as the remainderman was an infant aged eleven the corporation paid the compensation and accrued interest into Court in December, 1905.

The lessees applied for payment out.

Ashworth James, for the lessees. The so-called lessor's compensation belongs to the lessees, as owing to the large amount of shorts they have really paid the royalties in advance. The life tenant and remainderman, both of whom are bound by the lessees' right to make up shorts, get the full benefit of the compensation, as it is applied in reduction of shorts. The person to be compensated under s. 6 of the Waterworks Clauses Act, 1847, is the person "injuriously affected," and in the present case there need have been only one assessment, viz., for the lessees. The lessor was not in fact injuriously affected. The compensation was, however, split for convenience, without regard to the provision as to shorts, but it all belongs to the lessees, who could have got the whole coal without paying any more royalties: *Smith v. Great Western Ry. Co.* (1), a decision on the similar section of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 6.

Even if the lessees are not entitled to the compensation in their own right, they are entitled under the arrangement with the life tenant. The life tenant is absolutely entitled, as the coal would in all probability have been worked in his life. Indeed, the onus is really on the remainderman to shew this would have been impossible: *In re Barrington* (2); *Browne & Theobald on Railways*, 3rd ed. p. 192. Unless the lessees get the present value now, they will really lose the discount which they have allowed off the 2956*l.*

Errington, for the remainderman and the trustees. The right

(1) (1877) 3 App. Cas. 165, 179, 180.

(2) 33 Ch. D. 523.

to make up shorts does not amount to a purchase of the coal. It is merely a right of set-off against future royalties. Now the lessor's compensation represents the five years' royalties, and the lessees can only claim it through the lessor. I admit they are entitled to an apportionment for the past two years, or four half-years. But they are not entitled to be paid the rest in advance, as, if they failed to pay the minimum rent, or the lease were forfeited, their right to make up the shorts would be gone.

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In *In re Robinson's Settlement Trusts* (1) Chitty J. criticized *In re Barrington* (2), and stated the correct mode of apportionment between life tenant and remainderman in these cases. The same mode was adopted in *Cardigan v. Curzon-Howe*. (3)

Orlando Bridgeman, for the life tenant and the mortgagees.

Baden Fuller, for the Doncaster Corporation.

Ashworth James in reply.

SWINFEN EADY (after stating the facts). The lessees claim the 2620*l.* on two grounds. In the first place they say that though it is paid in respect of the lessor's interest, it must really be treated as compensation to the persons injuriously affected by the coal being left unworked, and that having regard to the large sum to their credit for shorts, the lessees are the persons really injured. As they could have worked the whole of this coal without paying any royalties, they contend that the 2620*l.* paid in respect of the royalties ought to be paid to them forthwith.

The first answer to that contention is that the 2620*l.* was paid in respect of the lessor's interest, the lessees having been paid separately for their interest. Secondly, the workings in the ordinary course would not have included the whole of this coal till the end of 1908. Thirdly, the lessees have no direct title to this money. There is no debt owing to them by the lessor in respect of the shorts. They are only entitled to make them up by future workings, or set them off against future royalties on the hypothesis that the working is continued.

It is then urged that if the lessees are not entitled to the money

(1) [1891] 3 Ch. 129, 133.

(2) 33 Ch. D. 523.

(3) (1898) 14 Times L. R. 550.

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in their own right, it has at all events been made over to them by the life tenant, who is entitled to it under *In re Barrington* (1), seeing that the coal would probably have been worked out in his life. But the true principle of apportionment between life tenant and remainderman in these cases is that stated by Chitty J. in *In re Robinson's Settlement Trusts*. (2) He says: "If any apportionment had to be made, the right mode of ascertaining the amount of compensation payable to the tenant for life would be, to ascertain the number of years within which the minerals could be worked out. Say, for instance, twenty years; then to divide the compensation money into twenty parts, and give the tenant for life one of such parts every year. That mode of payment would exactly correspond with his rights in the minerals if the railway company had not intervened."

Applying that principle here, with the variation due to the fact that the coal would not have been worked out in equal instalments, the life tenant would, but for the provision as to shorts, have been entitled to an ascertainable proportion of the money each half-year during 1904 to 1908 inclusive, and I am unable to deal with the case on the footing that he is immediately entitled to the whole of the money.

I have not lost sight of the fact that the remainderman is also bound by the provision as to shorts, and if the life tenant dies, the minimum rent will alone be payable till the shorts are made good, which will take many years. But the difficulty I feel in paying the whole amount to the lessees forthwith is that events might happen which would give the reversioner a right to enter and determine the lease, and it is only upon the hypothesis that the lessees continue working under the lease till the end of 1908 that they will become entitled to the whole of the compensation. I am not, therefore, justified in making an order for immediate payment to them in respect of coal which in the ordinary course they would not have worked till the end of 1908, and which they could not in any case have worked if the lease were previously determined. I therefore direct the fund in Court to be apportioned according to the areas of coal which would have been worked out in the successive half-years,

(1) 33 Ch. D. 523.

(2) [1891] 3 Ch. 129, 133.

these areas to be verified by affidavit once for all. The apportioned amounts for the past half-years will be paid to the lessees at once, and the remaining amounts will be paid half-yearly on an affidavit that they still hold under the lease.

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Solicitors: *Clements, Williams & Co., for Brown, Wilkin & Scott, Wakefield: Royds & Rawstorne; Gribble, Oddie, Sinclair & Johnson.*

G. R. A.

In re CARY-ELWES' CONTRACT.

[1905 C. 3700.]

SWINFEN
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1906

Lands Clauses Acts—Compulsory Powers—Specific Performance—Notice to Treat—Award—Vendor's Action—Purchasers Compelled to take Conveyance—Form of Conveyance—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 75, 81, 82—Finance Act, 1895 (58 & 59 Vict. c. 16), s. 12.

March 16;
April 3, 5;
May 3.

A public body acquired certain lands and certain easements over other lands of the vendor, a life-tenant of settled estates, under the compulsory powers of a special Act, incorporating the Lands Clauses Consolidation Act, 1845, but not vesting the property. The proceedings were by notice to treat, arbitration and award, and there was no question as to the vendor's title.

The public body paid the purchase-money into Court and took possession, but refused to take a conveyance on the ground of expense. There was nothing in the special Act to justify this position:—

Held, that both under the ordinary law of specific performance and under the Finance Act, 1895, s. 12, the public body were bound to take a conveyance, and that this conveyance must be settled by the Court in case the parties differed.

Adams v. London and Blackwall Ry. Co., (1850) 2 Mac. & G. 118; *Regent's Canal Co. v. Ware*, (1857) 23 Beav. 575; *In re Pigott and Great Western Ry. Co.*, (1881) 18 Ch. D. 146; *Mason v. Stokes Bay Pier and Ry. Co.*, (1862) 32 L. J. (Ch.) 110; *Harding v. Metropolitan Ry. Co.*, (1872) L. R. 7 Ch. 154; and *Wolverhampton and Walsall Ry. Co. v. London and North Western Ry. Co.*, (1873) L. R. 16 Eq. 433, 439, applied.

VENDOR AND PURCHASER SUMMONS.

On October 6, 1903, the Scunthorpe Urban District Council, acting under the powers of the Scunthorpe Urban District Water Act, 1903 (3 Edw. 7, c. xciii.), which incorporated the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), except s. 127,

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gave the vendor, a life tenant of settled estates, notice to treat for two separate plots of land of one and two acres and certain easements, including rights of laying mains and pipes and a right of way under and over other lands of the vendor, the council undertaking to replace the soil over the pipes, reinstate water-courses, fences, roads and footpaths, and pay compensation from time to time for surface damage arising from repairing the pipes. Arbitrators were then appointed to assess the compensation, which the vendor put at 5000*l.*

Before the arbitration came on there was some correspondence between the parties with a view to reduce the area of the land over which the easements were to be acquired, which was coloured yellow and orange in the plan.

On June 1, 1904, the council's solicitors wrote that they would advise their clients to confine the land in which the easements for pipes, &c., were to be acquired to a strip fifteen feet wide, and sent an amended plan shewing the alteration. They added: "The area of the two colours yellow and orange would then be 3a. 2r. 22p. instead of 31a. 2r. 16p., as stated in Sched. II. to the notice to treat."

On June 4, 1904, the vendor's solicitors replied: "Our client will be only too glad if the council will definitely arrange to confine the area of the land in respect of which the easements for pipes, &c., are to be acquired to a strip fifteen feet wide, and if they will amend the plans in such a way as to carry out this proposal. We would remark, however, that on examining the proposed amended plans we find the old boundary lines of the belt of land, comprising about 31a. 2r. 16p., remain in black ink with the words 'limits of deviation on deposited plans' inserted. These words must be omitted, and the limits of deviation should not be shewn at all, as they will be no longer material, and if inserted might give rise to questions of doubt."

On June 18 the council's solicitors replied that they would send copies of the plan shewing the reduced width as agreed.

On June 21 they wrote: "As promised, we are sending you copies of the plan amended to shew the width of land for easements five yards and to contain 3a. 2r. 22p. in accordance with our agreement with you. We cannot eliminate the lines of

deviation without incurring a large expense which is unnecessary, and we hereby undertake that in the conveyance of the property we will not ask that these lines should be shewn on the plan to the deed."

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The matter then proceeded on this footing.

The vendor had throughout also insisted that the rights and easements specified in the notice to treat were in excess of the council's statutory powers. This objection was insisted on at the arbitration in August, 1904. In the result it was agreed by the solicitors that the notice to treat should be regarded as amended, and the amendments were introduced into a copy of the notice to treat, which was subsequently annexed to the award of September 14, 1904. One of these amendments incorporated the Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883 (46 & 47 Vict. c. 37), so as to exclude the council from any right of support for their pipes.

On December 10, 1904, the council paid 1836*l.*, the amount of the award, into Court.

On December 15, 1904, they took possession.

No question arose on the vendor's title, but the council refused to take a conveyance, saying that they were content to rest their title for the present on the special Act, notice to treat, and award, and contending that though entitled to require a conveyance they could not be compelled to accept one against their will. This refusal was on the ground of expense, as the costs claimed by the vendor and his mortgagees already exceeded 1100*l.* There was nothing in the special Act to justify the refusal.

On June 2, 1905, they stamped a copy of the special Act with 9*l.* 5*s.*, the duty on the purchase-money, and produced it to the Inland Revenue Commissioners pursuant to s. 12 of the Finance Act, 1895, treating the matter as if the special Act had itself vested the property.

On November 21, 1905, the vendor, who wished to have the easements properly defined, issued this summons for (a) a declaration that the contract constituted by the special Act, notice to treat, and award ought to be completed and carried into effect and the terms of the said sale and purchase finally ascertained and evidenced by the execution of a proper deed of conveyance

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or covenant or some other proper assurance containing a proper description and definition of the land, rights, easements, and property agreed to be sold and purchased, and containing all proper covenants and provisions for the protection of the vendor and purchasers and their respective successors in title; and (b) an order that such deed of conveyance or covenant or such other proper assurance as aforesaid might in default of agreement between the parties be settled by and under the direction of the Court.

Sargent, for the vendor. The council are in the same position as ordinary purchasers, and can be compelled to take a conveyance: *Mason v. Stokes Bay Pier and Ry. Co.* (1); *Harding v. Metropolitan Ry. Co.* (2); *Wolverhampton and Walsall Ry. Co. v. London and North Western Ry. Co.* (3); *In re Pigott and Great Western Ry. Co.* (4) This is especially necessary where they are taking easements, which can only be created by grant or prescription. The vendor is clearly entitled to have them defined by grant in order to shew subsequent purchasers of the servient tenement what the rights really are. The award merely determines the compensation, not the other rights. If the matter were left to prescription the council might acquire a right of support for their pipes, contrary to the contract. The Lands Clauses Consolidation Act, 1845, really contemplates that the public body will take some sort of conveyance, and in the present case the correspondence shews that the whole matter has proceeded on that footing. The vendor cannot be expected to rely on the executory contract, as varied by the correspondence and amendments of the plans and notice to treat, or to remain a perpetual trustee for the council. He is also entitled to proper covenants defining the council's obligations as to reinstatement of roads, payment of compensation for surface damage, and so on.

Henry Fellows, for the council. On an ordinary contract, as soon as the title is clear, the purchaser is bound, (a) to pay the purchase-money; and (b) to take possession of the property, so that the vendor may be relieved from all future liabilities incident

(1) 32 L. J. (Ch.) 110.

(2) L. R. 7 Ch. 154.

(3) L. R. 16 Eq. 435, 439.

(4) 18 Ch. D. 146.

to the ownership: Fry on Specific Performance, 4th ed. p. 590. But there is no authority deciding that he is compelled to take a conveyance except in cases like *Harding v. Metropolitan Ry. Co.* (1), where the property was leasehold and a covenant of indemnity was required. In *Mason v. Stokes Bay Pier and Ry. Co.* (2) there was merely a decree for payment of the purchase-money with interest and costs.

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Secondly, on a compulsory purchase under the Lands Clauses Consolidation Act, 1845, ss. 75, 81, 82, the public body are entitled to require a conveyance, but they are not bound to take one, and in practice they frequently rest on their equitable title. This is clear from s. 75, which provides that upon deposit of the compensation in the bank the owner of the lands taken shall, "when required to do so by the promoters of the undertaking, duly convey such lands." No corresponding right is given to the owner.

Thirdly, s. 81 provides that conveyances of lands to be purchased under the provisions of this or the special Act, or any Act incorporated therewith, may be according to the forms in the Schedules (A) and (B) respectively to this Act, or as near thereto as the circumstances of the case will admit, "or by deed in any other form which the promoters of the undertaking may think fit." This shews that if the council elect to take a conveyance they can take it in any form they think fit. The Court, therefore, has no jurisdiction to settle it.

[SWINFEN EADY J. They must take it in a proper form, and if there is a difference of opinion the Court must settle it. This point is absolutely untenable.]

Fourthly, there is no doubt that a conveyance was in the contemplation of both parties, but there was never a definite undertaking to take one.

[SWINFEN EADY J. As the property was not vested by the special Act the council are bound to produce a duly stamped conveyance to the Inland Revenue Commissioners under the Finance Act, 1895, s. 12.]

That is only a revenue Act, which does not affect the mutual rights of vendor and purchaser. The special Act was in fact

(1) L. R. 7 Ch. 154.

(2) 32 L. J. (Ch.) 110.

SWINFEN stamped with the duty and produced to the Commissioners, and
EADY J. if the council now take a conveyance it will be free marked.

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Sargant in reply.

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May 3. SWINFEN EADY J. (after stating the facts). It is well settled that in cases of compulsory purchase, after notice to treat and ascertainment of the price, a contract is established, enforceable in a Court of Equity, and with regard to which both vendor and purchaser can enforce specific performance: *Adams v. London and Blackwall Ry. Co.* (1); *Regent's Canal Co. v. Ware*. (2) Following these decisions, it was held by Jessel M.R. in *In re Pigott and Great Western Ry. Co.* (3) that as specific performance of the contract, as a contract of purchase and sale, or sale and purchase, may be enforced, all the ordinary rules apply, unless you find some statutory enactment in the way. In that case Jessel M.R. applied the rule, stated in Dart's Vendors and Purchasers, 5th ed. pp. 629-30, 7th ed. p. 653, that where the vendor has shewn his title the purchaser pays interest from the time at which he might prudently have taken possession, supposing it to have been offered him, that is, the time when a good title was shewn. That is the ordinary rule.

The reason why equity interfered to enforce a statutory contract, after notice to treat and ascertainment of the price, is stated by Wood V.-C. in *Mason v. Stokes Bay Pier and Ry. Co.* (4) It was because a Court of law would be unable to do complete justice between the parties, having no machinery either for investigating the title or settling the conveyance. In that case, which was a suit to compel specific performance of a compulsory purchase of freeholds, he made a decree against the company, and said that Romilly M.R. had put the matter on the right grounds in *Regent's Canal Co. v. Ware* (2); that after notice given and the price fixed, the relation of the parties as vendor and purchaser was as fully constituted as in the case of a formal and regular agreement. And in a subsequent case of *Harding v. Metropolitan Ry. Co.* (5) the same learned judge, when Lord

(1) 2 Mac. & G. 118.

(3) 18 Ch. D. 146.

(2) 23 Beav. 575.

(4) 32 L. J. (Ch.) 110.

(5) L. R. 7 Ch. 154.

Chancellor, overruled Lord Romilly M.R. and compelled the railway company, against their will, to take an assignment of leasehold premises which they had purchased compulsorily and had already paid for.

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The principle is fully established that when land is purchased compulsorily, after the price has been ascertained, the purchaser is in the same position with regard to the landowner as an ordinary purchaser, and will be compelled by a Court of Equity to complete the purchase. It is an implied term of every contract for the sale of real property, if not expressed, that the contract shall be followed by a deed of conveyance conveying the property to a purchaser, and this may be enforced by a suit for specific performance. In *Wolverhampton and Walsall Ry. Co. v. London and North Western Ry. Co.* (1) Lord Selborne said: "The common expression, 'specific performance,' as applied to suits known by that name, presupposes an executory as distinct from an executed agreement, something remaining to be done, such as the execution of a deed or a conveyance, in order to put the parties in the position relative to each other in which by the preliminary agreement they were intended to be placed." The intention of the parties in an ordinary contract for the sale and purchase of real property is that the purchaser shall pay the purchase-money and that the property shall be conveyed by a duly executed deed to the purchaser. Equity looks upon things agreed to be done as actually performed; consequently, when a contract is made for sale of an estate, equity considers the vendor as a trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase-money for the vendor: Sugden's Vendors and Purchasers, 14th ed. p. 175.

It is not, however, in the contemplation of the parties that the vendor shall remain a trustee for the purchaser for an indefinite period; the intention is that in due course the property shall be conveyed to the purchaser, and the vendor divested of all estate and interest in it, legal and equitable. In my opinion the position is the same under a statutory purchase and sale, and a conveyance must be executed, except, of course, in those cases in which the Act of Parliament itself operates as a conveyance.

(1) L. R. 16 Eq. 433, 439.

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This position is recognized by the Finance Act, 1895, s. 12. This section provides that where by virtue of any Act, any property is vested by way of sale in any person, such person shall within three months after the passing of the Act, or the date of vesting, whichever is later, produce to the Commissioners of Inland Revenue a copy of the Act, or some instrument relating to the vesting duly stamped with the ad valorem duty payable upon a conveyance on sale of the property; and where any person by virtue of any Act is authorized to purchase property (which is the present case) such person shall within three months after the completion of the purchase produce to the Commissioners an instrument of conveyance of the property duly stamped.

In my judgment the respondents are bound, as in the case of an ordinary purchase, to take a conveyance, and there must be an order in the terms of the summons—the conveyance in case of disagreement to be settled under the direction of the Court. The respondents must pay the costs of the application.

Solicitors : *Tamplin, Tayler & Joseph ; Collyer-Bristow, Curtis, Booth, Birks & Langley, for Freer, Hett & Hett, Brigg.*

G. R. A.

In re EARL OF EGMONT'S SETTLED ESTATES.
LEFROY *v.* EARL OF EGMONT.

[1906 E. 110.]

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March 31;
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*Settled Land—Tenant for Life—Capital Money—Improvements—Scheme—
Approval of Trustees—Discretion—Settled Land Act, 1882 (45 & 46 Vict.
c. 38), ss. 25, 26, 53.*

Where under s. 26 of the Settled Land Act, 1882, a tenant for life submits for approval to the trustees of the settlement a scheme for the execution of an improvement, the duty of the trustees is confined to seeing—(1.) that the improvement proposed is an improvement authorized by the Act, namely, that it is for the benefit of some land comprised in the settlement; (2.) that the scheme for the execution of the improvement is a proper one for carrying out the particular improvement; and (3.) that in submitting the scheme to the trustees the tenant for life is acting bona fide and on competent skilled advice. The trustees are not concerned with the general policy pursued by the tenant for life in improving the property, nor, in a case where there is capital money in hand, with the amount already spent on improvements.

ADJOURNED SUMMONS.

Under a settlement dated August 15, 1889, the Cowdray Park Estate, in the counties of Sussex and Southampton, and other hereditaments in the counties of Surrey and Buckinghamshire, stood limited and settled to the use of the present Earl of Egmont for life, with remainder to the use of his issue in tail male, with remainder to the use of his brother Charles John Percival for life, with remainder to the use of his issue in tail male with divers remainders over. The settlement contained (inter alia) the following provisions: “(First) The trustees or trustee for the time being of these presents whether several or only one are and is hereby appointed and declared to be the trustees of this settlement for all the purposes of the Settled Land Act, 1882, and any Act or Acts altering or amending the same. . . . (Fourthly) For the like purposes (i.e., of the settlement) s. 25 of the Act last aforesaid shall be read and take effect as if in addition to the works or purposes of improvement therein enumerated there were inserted therein the words ‘rebuilding

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reparation or permanent improvement or additions of or to buildings of any description whether used or occupied for residential farm or other purposes.' (Fifthly) For the like purposes s. 18 of the Act last aforesaid shall be read and acted upon as if the words 'or for improvements' were inserted in that section immediately after the word 'partition' therein."

The Earl of Egmont, the present tenant for life, succeeded to the property in 1897. He was now fifty years of age, and although married had had no issue.

Charles John Percival, the first tenant in remainder, was resident in South Africa.

Since the time of his coming into possession of the property the tenant for life had submitted for the approval of the trustees of the settlement various schemes for the execution of works of improvement and reparation. These schemes had been approved by them and partly carried out.

The trustees had already expended nearly 50,000*l.* on the property, and had 108,000*l.* capital moneys in hand.

Owing to the fact that the first remainderman was resident in South Africa and declined to answer letters, the trustees were unable to consult him on the subject of the improvements. They were therefore desirous before sanctioning any further schemes, which they were informed by the advisers of the tenant for life would from time to time be submitted to them for their approval, to obtain a general declaration from the Court as to the considerations to which they ought to have regard in approving them. They accordingly took out the present summons under the Settled Land Acts, 1882 to 1890, against the tenant for life asking to have it determined whether, upon the true construction of the settlement and the Settled Land Acts, 1882 to 1890, the plaintiffs, as such trustees, before deciding to approve or withhold their approval from schemes for the execution of improvements falling within the terms of the Settled Land Acts, 1882 to 1890, as extended by the settlement, ought to have regard to any or all of the following matters: (a) The number of previous schemes and the amount of capital moneys already expended or liable to be called for thereunder;

(b) the general connection between the improvements mentioned in the scheme proposed for their approval with improvements contained in schemes already sanctioned or the general policy which was being pursued by the tenant for life in improving the property; (c) the proportion between the probable cost of the improvements mentioned in the proposed scheme and the probable increased annual value of the estate; (d) the amount of capital moneys in their hands and the relation between such amount and the value of the estate.

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Rowden, K.C., and *R. J. Parker*, for the trustees. The question is whether we ought to exhaust the capital in this direction when we cannot get the consent of the remaindermen. We ask for a declaration that as trustees we have a discretion which it is our duty to exercise; that we are not bound to approve of a scheme of improvements merely because it comes within s. 25 of the Settled Land Act, 1882, and the power in the settlement; and for a direction what facts we are to have regard to in arriving at a conclusion.

Sect. 21, sub-s. (iii.), of the Act provides for the expenditure of capital money on improvements, and s. 25 defines improvements. Under s. 26 the Court is not bound to approve of a scheme because it is within s. 25. The position of trustees would be much easier if they were so bound, but they also have a discretion. Sect. 26 says that schemes have to be submitted for their approval, and approval implies an exercise of discretion: *In re Millard's Settled Estates* (1); *In re Marquis of Bristol's Settled Estates*. (2) The discretion vested in the trustees is similar to that vested in the Court: *In re Duke of Norfolk's Parliamentary Estates*. (3)

[WARRINGTON J. referred to *Clarke v. Thornton*. (4)]

The duties of the Court are not merely ministerial; it has to exercise a discretion: *In re Keck's Settlement*. (5) The tenant for life is not the absolute master of the situation so as to confine the duty of the trustees to seeing whether the scheme is

(1) [1893] 3 Ch. 116, 120. (3) [1900] 1 Ch. 461, 467.
(2) [1893] 3 Ch. 161, 167. (4) (1887) 35 Ch. D. 307.
(5) [1904] 2 Ch. 22..

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within s. 25 or not. The trustees have a discretion to refuse their consent, notwithstanding that the scheme is within that section. If they do so there will be a difference between them and the tenant for life, which will enable either party to refer the matter to the Court under s. 44, and that section gives the Court a wide discretion. Trustees are for this purpose in a position analogous to that of trustees who have to invest trust funds and must exercise a discretion in doing so: *Leaoyd v. Whiteley*. (1) This is not a hostile proceeding, but we are unwilling to take the responsibility of spending so much of the capital on this estate without the direction of the Court.

H. Terrell, K.C., and *Peterson*, for the tenant for life. The scheme of the Act of 1882 is to invest the tenant for life with the widest possible powers: *In re Duke of Norfolk's Parliamentary Estates* (2), and to make him master of the situation: *In re Marquis of Ailesbury's Settled Estates*. (3)

By s. 18, as extended by the settlement, the tenant for life is empowered to raise money by mortgage of the settled land for improvements. The amount to be so raised is a matter entirely within his discretion. By s. 21 the modes in which capital money may be applied are enumerated, and by s. 22 sub-s. 2, it is provided that the application of the capital money shall be according to the direction of the tenant for life. Under that sub-section the tenant for life has an absolute discretion as to the mode of its application: *In re Hotham* (4); but this discretion he must exercise with a due regard to s. 53.

The discretion vested in the trustees by s. 26 is not an unlimited discretion: *Clarke v. Thornton*. (5) The scheme to be submitted to them for approval by the tenant for life is not a scheme for the improvement, but for the execution of the improvement. The duties of the trustees are confined to seeing that the improvement proposed by the tenant for life is one authorized by the Act and settlement and is for the benefit of the settled land, and is not so improvident as to be improper

(1) (1887) 12 App. Cas. 727.

(3) [1892] 1 Ch. 506, 535.

(2) [1900] 1 Ch. 461, 467.

(4) [1902] 2 Ch. 575.

(5) 35 Ch. D. 307, 313.

or reckless; that the scheme for the execution of the improvement is a proper one for carrying out the particular improvement; and that the tenant for life, in submitting it, is acting with a due regard to s. 53 and on competent skilled advice. The trustees have no discretion to say whether or not the improvement shall be carried out. It cannot have been the intention of the Act that there should be two authorities, the tenant for life and the trustees, who should decide upon the policy to be adopted in improving the settled land. The trustees, it is submitted, have nothing to do with the question whether the general policy of the tenant for life with regard to the improvement of the settled land is one which they themselves would have adopted.

Rowden, K.C., in reply. The approval by trustees of a scheme for improvements involves something more than the mere approval of the details of carrying out the improvements: *In re Calverley's Settled Estates*.⁽¹⁾ The trustees have, it is submitted, a discretion as to the general nature of the improvements.

WARRINGTON J. The question I have to decide is one that has never arisen directly for judicial decision, although the Settled Land Act, 1882, has now been in operation for about twenty-three years, namely, what are the considerations which the trustees are to take into account in determining whether or not they shall approve of a scheme submitted to them for approval under s. 26 of the Act. [His Lordship read the summons and continued :—]

Putting it very shortly, that may be summed up in this way : that the trustees suggest that in considering whether they are to give or withhold their approval to schemes submitted to them under s. 26, they may properly inquire into what may be called the entire policy pursued by the tenant for life with reference to the improvement of the settled estates. Is that the true view ? As I have said, the question seems to me to be entirely devoid of direct authority, and the utmost that can be said about it is that there are to be found remarks by several judges in certain decided cases on other questions arising under the Act, which

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throw some light on what, without having had that point argued, those particular judges thought was the proper construction of this section.

Now before I go in detail to the provisions of the Act I must refer to the settlement, because that is not without importance in this case, though what I am about to say will not be confined to this case merely by the fact that the settlement contains some particular provisions. The settlement in question is the settlement of the Egmont family estates, consisting mainly of the Cowdray Park Estate, and by it the estates are settled in strict settlement, the respondent to this application being the present tenant for life. Towards the end of the settlement there are some special provisions which are material for the determination of the question I have to decide, and they are these: It is provided, first, that the trustees of the settlement are to be trustees of the settlement for the purposes of the Settled Land Act, 1882, and the amending Acts. Then follow two other clauses which are not material, and then comes this: “(Fourthly) For the like purposes (i.e., of the settlement) s. 25 of the Act last aforesaid”—that is, the Settled Land Act, 1882—“shall be read and take effect as if in addition to the works or purposes of improvement therein enumerated there were inserted therein the words ‘rebuilding reparation or permanent improvement or additions of or to buildings of any description, whether used or occupied for residential farm or other purposes.’ ” That is to say, the clause adds an item to the enumeration of the improvements in s. 25 in the Act of 1882, and s. 13 of the Act of 1890, and an item of very wide application, especially having regard to the insertion therein of the word “reparation,” which has been held, I understand, by Byrne J. to authorize the tenant for life to treat as an improvement any repairs which are not simply decorative repairs. Then there is another clause: “(Fifthly) For the like purposes, s. 18 of the Act last aforesaid shall be read and acted upon as if the words ‘or for improvements’ were inserted in that section immediately after the word ‘partition’ therein.” Now that will make s. 18 read as follows: “Where money is required for enfranchisement, or for equality of exchange or partition or

for improvements, the tenant for life may raise the same on mortgage of the settled land, or of any part thereof, by conveyance of the fee simple," and so on. The importance of that is this: that the tenant for life therefore, in this settlement, can get improvements executed although there may be no capital money in the hands of the trustees, because he may determine under s. 18, and act on that determination, that moneys shall be raised by mortgage of the estate. So that, except in the case of it being no longer possible to raise money, there never, under this settlement, can be a case in which there is no capital money applicable for improvements. There is nothing more in the settlement that I need read, and I now go back to the Act.

In the first place the definition of land in s. 2, sub-s. 3, must be considered. "Land"—omitting immaterial words—"which is the subject of a settlement, is for purposes of this Act settled land, and is, in relation to the settlement, referred to in this Act as the settled land." That sub-section is, I think, very accurately drawn, if I may say so with all respect to the draftsman, and by it he means two quite separate things. Land which is the subject of the settlement is for purposes of this Act settled land, and when it is referred to in relation to the settlement then it is the settled land. If one finds the word "land" used without reference to the settlement itself then it is simply settled land. In other words, the particular settlement becomes itself immaterial when it is not used in relation to the trust settlement. Now I need not read all the earlier sections of the Act, but perhaps I ought just to refer to s. 21, which provides for the application of capital trust money: "Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes (namely): . . . (iii.) In payment for any improvement authorized by this Act." Of course, in reading that section, payment for an improvement is an application of the capital money as distinct from an investment of the capital money. Then, if one turns to s. 22: "(1.) Capital money arising under

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this Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into Court, at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the Court, as the case may be, accordingly. (2.) The investment or other application by the trustees shall be made according to the direction of the tenant for life. . . .” It is, therefore, the tenant for life who directs not only the investment, but the application of the fund, that is to say, the dealing with the fund which under s. 21 is described as the application in payment for any improvement. Sect. 25 defines what is meant by “improvements,” the expression used being “Improvements authorized by this Act.” “Improvements authorized by this Act are the making or execution on, or in connection with, or for the benefit of settled land, of any of the following works.” I need not read them. They are not, be it observed, for the benefit of the land the subject of the settlement, or the settled land, but they are for the benefit of settled land. Therefore, it seems to me, if one turns back to the definition in s. 2, they are for the benefit of land the subject of the settlement.

That being the definition of improvements authorized by the Act, we then come to s. 26, upon which the controversy in the present case arises. It provides that: “(1.) Where the tenant for life is desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorized by this Act, he may submit for approval to the trustees of the settlement, or to the Court, as the case may require, a scheme for the execution of the improvement, shewing the proposed expenditure thereon.” Pausing there for one moment, at first one finds the tenant for life exercising the power in s. 22 of giving a direction, and the direction he gives is that capital money arising under this Act shall be applied in or towards payment for improvements authorized by this Act. It is clear, therefore, that his direction is of no avail, and would have no effect on the trustees if the application which he was directing was in payment for something which was not an improvement authorized by the Act. Undoubtedly, therefore, the tenant for life has to satisfy the trustees, or, if necessary,

the Court, that what he is proposing is an improvement authorized by the Act. Having got so far, what is it that the trustees have to approve? It is not the improvement itself—it is a scheme for the execution of the improvement; and it seems to me that when the trustees have arrived at the conclusion and have been satisfied by the tenant for life that the object of the proposed expenditure is an improvement authorized by the Act, the scheme which they have to approve or to withhold their approval from is a scheme for the execution of the improvement. To put it in other words, it is for the tenant for life to select and decide on what he wishes to have done. It is for the tenant for life to propose, and it is for the trustees to approve, the mode in which that shall be carried into effect.

Now, is there anything else in the Act which throws any further light on the meaning of that section? Sect. 26 goes on: “(2.) Where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them,”—“the scheme” must of course be the scheme which is referred to, that is, the scheme for the execution of the works—“the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement, on—” (i.) A certificate of the Land Commissioners certifying—I take it very shortly—that the work has been executed, and that a particular sum ought to be paid in consideration thereof; or on (ii.) A like certificate of a competent engineer or able practical surveyor. Those are merely modes of ascertaining the fact, namely, that the scheme has been carried out, and that the money is properly payable by the trustees.

But then it does not rest there. The third alternative is on “(iii.) An order of the Court directing or authorizing the trustees to so apply a specified portion of the capital money.” Under that sub-clause it has been held by Farwell J. in *In re Keck’s Settlement* (1)—a case to which I may presently have to return—that what the Court has to do is not to perform the function of an able practical surveyor and merely see whether the work has been carried out, but to repeat over again what has, and what in that case had, been done by the trustees, namely, consider

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the scheme. A good deal of the controversy in the present case has turned upon the remarks made by Farwell J. with reference to what it is to which the Court in considering the scheme will pay attention. On that I may have to come back to that case again. Then there is a provision in s. 26: “(3.) Where the capital money to be expended is in Court, then, after a scheme”—which I think must be the same thing that has been referred to before, namely, a scheme for the execution of the improvements—“is approved by the Court, the Court may, if it thinks fit, on a report or certificate of the Commissioners, or of a competent engineer or able practical surveyor, approved by the Court, or on such other evidence as the Court thinks sufficient, make such order and give such directions as it thinks fit for the application of that money, or any part thereof, in or towards payment for the whole or part of any work or operation comprised in the improvement.”

Now it is to be observed that when the Court is dealing with the scheme very wide powers are given to it of either allowing or disallowing expenditure—much wider than those given to the trustees. In my view, therefore, without for the moment referring to authority, the duty of the trustees, having regard to s. 26 alone, and comparing it with the other sections forming the fasciculus of sections relating to improvements, is confined to seeing that the improvement proposed is really an improvement authorized by the Act, that is to say, that it is for the benefit of some land comprised in the settlement—for the benefit of settled land—and further to seeing that the scheme for the execution of that improvement is a proper one for carrying out that improvement; and incidentally I think the trustees would be justified in satisfying themselves that, in preparing and submitting the scheme for their approval, the tenant for life was acting under competent skilled advice in reference to the execution of the improvement.

The matter does not quite rest there, because trustees have also in every case in which they are considering a proposal made by a tenant for life under the Act to take into consideration s. 53. That section provides that “A tenant for life shall, in exercising any power under this Act, have regard to the interests of all

parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties.” It seems to me, therefore, that there is a further consideration which the trustees in considering a scheme must bear in mind, namely, whether or not the tenant for life is proposing something which is outside his position as a tenant for life acting in regard to the interests of all parties entitled under the settlement, and deemed to be in the position of and to have the duties and liabilities of a trustee. In my view, therefore, putting it concisely, the general policy of the tenant for life as to the improvements he may propose is not a matter with which the trustees are concerned.

Now let me just look for a moment at the details of the summons and see whether every one of them is not capable on that assumption of being excluded from the consideration of the trustees. Clause (a) is: “The number of previous schemes and the amount of capital moneys already expended or liable to be called for thereunder.” It seems to me that—except in a case which, for the reasons I have mentioned, cannot apply to this case because of the unlimited power which the tenant for life has to provide money for improvements—it cannot be material, in considering whether the scheme is one authorized by the Act, for the trustees to consider the number of the previous schemes or the amount of the capital moneys already expended. If a scheme is submitted to the trustees for the execution of which there are no capital moneys in hand, then, of course, questions arise which were determined in the previous cases of *In re Millard’s Settled Estates* (1) and *In re Duke of Norfolk’s Parliamentary Estates*. (2) But, except in such a case, it seems to me that the trustees have nothing to do with the amount of money which has been expended or the amount which they have in their hands. Clause (b) is: “The general connection between the improvements mentioned in the scheme proposed for their approval with improvements contained in schemes already sanctioned, or the general policy which is being pursued by the tenant for life in improving the property.” There again it seems to me that that is not a matter which it

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(2) [1900] 1 Ch. 461.

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is for the trustees to consider. It is one for the tenant for life who has the control, subject to the not very stringent limitations which are provided by the Act, and who is intended by the policy of the Act to have the control of the management of the settled estate. Clause (c) is: "The proportion between the probable cost of the improvements mentioned in the proposed scheme and the probable increased annual value of the estate." It is possible that in some modified form, of course, that particular item might have to be taken into account in considering whether or not the scheme is or is not for the benefit of settled land. It is quite possible that the trustees might take that into account in performing that part of their duty; but beyond that I do not think they would have to consider that particular item. Clause (d) is: "The amount of capital moneys in their hands and the relation between such amount and the value of the estate." Those circumstances, it seems to me, in this case at all events, the trustees have not to take into account because of the wide powers of raising money by mortgage which are given to the tenant for life.

Is there then anything in any of the authorities which have been cited to me which prevents me from coming to the conclusion which I have expressed on the construction of the Act itself? I have already said there is no authority directly in point. The two earlier authorities of *In re Millard's Settled Estates* (1) and *In re Marquis of Bristol's Settled Estates* (2) I think really throw no light upon the question. The most light is thrown by *In re Keck's Settlement*. (3) All that was there decided was that where an application is made under s. 26, sub-s. 2 (iii.), for an order directing the trustees to apply capital moneys in the payment of an improvement, the Court is entitled and bound to consider whether or not such expenditure is proper, and has not merely to see that the improvement is one authorized by the Act and that it has been carried into execution.

In that case the scheme had been approved by the trustees and the work had been done. The trustees were attacked by the remainderman, and in consequence refused to pay the money without an order of the Court. The remainderman contended

(1) [1893] 3 Ch. 116.

(2) [1893] 3 Ch. 161.

(3) [1904] 2 Ch. 22.

that the particular improvement there was not an improvement authorized by the Act, because, it being a road intended to form part of a scheme for the laying out of the estate for building purposes, the laying out of the estate for building purposes was premature, and therefore the improvement was not for the benefit of settled land. Farwell J. came to the conclusion that he must go into the question of the scheme itself, and he made these observations (1): "The tenant for life contends that the Court has no further function than to make an order on being satisfied that the scheme has been approved and the money spent. The person next entitled in remainder opposes, and desires to go into evidence to shew that the scheme is improvident, and that the general trend of the tenant for life's action in respect of the management of this estate has been a too speedy development, to the great detriment of the estate." It is to be observed that there the learned judge was not stating what he thought was the question he had to decide. He was stating what the person next in remainder contended and the evidence into which he desired to go. The learned judge continued: "That is the case he wishes to put forward; and, after a perusal of lengthy affidavits by surveyors on both sides, it seems to me that, in the conflict of testimony which they disclose, I can only arrive at a satisfactory determination of the facts by seeing the witnesses in the box." Then he went on to consider what was the duty of the Court under that 3rd sub-section, and I need read nothing further until I come to the passage, in which, dealing with sub-s. 2 of s. 26, his Lordship said: "It will be observed that the first two clauses of sub-s. 2 of s. 26 deal with matters of fact—that is to say, that the work has been properly executed, which is a matter best proved by some able practical surveyor or a man of experience of that nature, and that the amount is properly payable by the trustees in respect thereof. Those are matters of fact, and not matters of law. With respect to those two, the trustees get a discharge for any payment made by them on the certificate. But then there is the third alternative of an order of the Court. I cannot think that the intention was merely to substitute an order made on a formal application to the

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(1) [1904] 2 Ch. 25, 26.

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Court for the certificate of the able practical surveyor, and nothing more. I cannot resist the conviction that inasmuch as these improvements may be of a very expensive nature, and require a very considerable amount of discretion, it has been thought advisable to insert a provision by which, although the trustees may have approved the scheme, and although the tenant for life may direct the money to be so employed, it is possible to bring the matter before the Court for the exercise of its judicial discretion."

There is just one other passage which I think I ought to read. The learned judge said: "If the trustees had chosen to obtain the certificate of the able practical surveyor, or other person mentioned in sub-s. 2, the matter could only have been brought before the Court by the remaindermen themselves challenging the proceeding as something which ought not to have been done. But if, as the case now is, the tenant for life and the trustees, acting in concert, although not concurring in the application, seek to obtain an order of the Court to sanction the application of the money instead of themselves relying on any such certificate, then it appears to me that the Court has cast upon it a discretion which, I think, is exceedingly difficult to discharge, namely, a discretion to see whether the remainderman is in fact well founded in saying that the improvements are, although honest, so utterly wrong-headed that they ought not to be sanctioned." He then read a passage from Byrne J.'s judgment in *In re Duke of Norfolk's Parliamentary Estates* (1), which I may as well read here, as it will prevent my having to refer again to that case. Byrne J. said (2): "The scheme of the Act is to give wide powers to the tenant for life, and to give power of consent to trustees, upon the footing that they will act fairly in the exercise of their respective powers, and that neither trustees nor the Court will sanction schemes which are improvident, or which will unduly fetter any discretion which ought to be exercised at a later date, and there is always this safeguard, that tenants for life and trustees joining in improvident schemes, or not acting with a due regard to the interest of the remaindermen, are running the risk of the possible establishment of a personal liability against

(1) [1900] 1 Ch. 461.

(2) [1900] 1 Ch. 467.

themselves.” That, of course, is under s. 53, which I have already read.

Now, as I have said, that case and *In re Duke of Norfolk’s Parliamentary Estates* (1), which is referred to therein, are the only cases which seem to me to bear upon this point at all, and they do not bear directly upon it. But it has been contended on behalf of the trustees that the expressions used by Farwell J. and Byrne J. in their respective judgments in those cases—namely, “an improvident scheme,” “consent of the trustees being required,” “the tenant for life is putting forward improvements which, though honest, are so utterly wrong-headed that they ought not to be sanctioned”—shew that those two learned judges thought that the trustees had a discretion to exercise much wider than that which I have come to the conclusion is the discretion vested in them ; but when considered, and considered in reference to the points before them, and which were alone argued before them, in my judgment those expressions cannot be carried to the extent which the trustees in the present case would have them carried. I think they are all capable of being satisfied if the discretion of the trustees is limited in the way I propose to limit it—namely, that their attention is to be confined to considering whether, first, the scheme is for the benefit of settled land ; secondly, whether the scheme for the execution of the improvements is a proper scheme ; and, thirdly, whether, in proposing the scheme, the tenant for life is acting within the restrictions imposed upon him by s. 53. I do not think I need go through the other case. I propose, therefore, to declare that the trustees may properly approve any scheme submitted to them by the tenant for life where they are satisfied (1.) that the improvement is within s. 25 of the Act as enlarged by the settlement ; and (2.) that the tenant for life is acting bona fide, and on competent advice as to the improvement proposed, the amount to be expended thereon, and the method of execution thereof, and that they are not bound to take into consideration any of the various matters referred to in the summons.

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Solicitors : *Littledale & Lefroy ; Nash, Field & Co.*

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[1905 T. 1488.]

*April 30 ; Landlord and Tenant—Lease—Lessor's Covenant—Construction—Good and
May 1. substantial Repair—Old Building—Natural Decay—Extent of Obligation.*

A covenant by a lessor to keep the outside walls of the demised premises in repair will be construed as a covenant to repair on notice, and there can be no breach of such a covenant until the lessor has notice of want of repair.

The principles of construction which have been applied to lessees' covenants to repair apply equally to similar covenants by lessors. Regard must be had to the age and condition of the buildings to which the covenant refers. A lessor is not bound by such a covenant to rebuild during the term of the lease premises which have at the date at which he receives notice become worn out by age, and, merely from the action of time on the materials used, been reduced to a state in which repair is impossible.

In 1890 the three upper storeys of a house in London were demised to the lessee for a term of eighteen years from March 25, 1890, at a rent of 150*l*. The lessor covenanted to keep the outside of the demised premises in good and substantial repair. The lessee covenanted to keep the inside in repair, to permit the lessor to enter and view the state of repair, and to use the premises for the business of a private hotel-keeper. In 1905 the plaintiff was the assignee of this lease and the defendant was the owner of the reversion. On July 13, 1905, the London County Council served on the premises a notice requiring the owner to take down the front and back walls of the house as being dangerous structures. The plaintiff at once communicated this notice to the defendant and required him to repair the walls. The defendant did nothing, and the London County Council themselves took down the walls from the first floor upwards, propped up the floors with timber, and left the place uninhabitable.

The plaintiff brought this action against the defendant for breach of the covenant to keep the outside in repair. The defendant had no notice before July 13, 1905, of any want of repair. At that date the house, which was about 200 years old, had by the natural effect of time become so worn out and decayed that it was impossible to repair it except by taking it down and rebuilding:—

Held, that there had been no breach of the lessor's covenant to repair.

By an indenture of lease dated May 31, 1890, and made between F. J. Dicker of the one part and Louisa Keeping of the other part, the first, second and third floors, with two rooms

and partial use of kitchen in the basement, and the yard, &c., of a messuage or dwelling-house being No. 8, Glasshouse Street and No. 1, Sherwood Street, Regent Street, in the county of Middlesex, were demised unto Louisa Keeping for eighteen years from March 25, 1890, at the yearly rent of 150*l*.

The lease contained a covenant by the lessee to keep the inside of the said premises in good and substantial repair, and the same in good and substantial repair to deliver up to the lessor at the determination of the said term, and also to permit the lessor, his heirs or assigns, and his or their servants or agents, twice in every year during the said term at convenient hours in the day-time to enter upon the demised premises and view the state of repair, and that the lessee, her executors, administrators or assigns would not at any time during the said term carry on, or permit to be carried on, any trade or business upon the said premises or permit the same to be occupied or used in any other manner than as a private hotel, and would conduct and carry on there the business of a private hotel in a thoroughly respectable manner. The lessor thereby covenanted, among other things, "That the lessor will at all times during the said term keep the outside of the said premises in good and substantial repair."

In January, 1905, the term of the lease was extended for a year and a half less three days (i.e., to September 26, 1909). On January 21, 1905, the lease was assigned to the plaintiff Mary Torrens. Shortly afterwards Mary Torrens sold the business of a private hotel, which she carried on upon the premises, to the Sherwood Hotels Company, Limited, a company in which she held shares, and agreed to assign the lease, but no assignment had been executed. The plaintiff Mary Torrens carried on the business as manager for the company, and held the lease as their trustee.

The leasehold reversion expectant on the term granted by the lease had meanwhile become vested in the defendant Annie Louisa Walker, as the successor in title of the original lessee.

The front wall of the house in question fronted partly to Glasshouse Street and partly to Sherwood Street, which join at

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an acute angle, and the house was numbered in each street; the back wall of the house was therefore of much less extent than the front wall.

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In 1905 the adjoining houses, 3 and 4, Sherwood Street, were pulled down, and it was then discovered that the demised house was in a very bad state of repair, and on July 13, 1905, the London County Council served on the premises notice under the London Building Acts, addressed to the owner, that having had it certified to them by the district surveyor that the structure, No. 1, Sherwood Street and No. 8, Glasshouse Street, was in a dangerous state, they required him forthwith to take down the front walls and back walls so far as they were broken, decayed, and out of form; also to take down the party wall next No. 3, Sherwood Street so far as it was broken, decayed, bulged, and out of form; and to do any other work rendered necessary by the foregoing, and that, the case being urgent, the council's works department had been instructed to shore up and hoard in the said structure immediately. The building was at once shored up by the council.

The plaintiff on receipt of that notice at once informed the defendant thereof through her solicitor, and gave her notice that the building was out of repair. Until that notice was served neither the plaintiff nor the defendant knew the dangerous state of the building. Early in August the plaintiff gave all the persons staying in the hotel notice to leave, and closed the hotel to visitors. On November 13 a magistrates' order was made requiring the owner to take down the walls according to the notice; this order was served on the plaintiff Torrens and communicated to the defendant, but the defendant made no attempt to comply with the order. The plaintiff Torrens left the hotel early in November, and immediately afterwards the London County Council themselves pulled down the front wall of the demised premises, i.e., of all the storeys above the first floor of the house and part of the back wall, propped up the floors with timber, and left the place wholly uninhabitable.

This action was commenced on October 11, 1905, by Mrs. Torrens and the company as co-plaintiffs against Mrs. Walker, asking for an injunction to restrain the defendant from keeping

the outside walls of the demised premises out of repair, and for damages. At the hearing the claim was limited to damages.

Upon the evidence the learned judge found the following facts:—The house No. 1, Sherwood Street, which was about 200 years old, was worn out, not from any neglect, but from the natural effect of time on the materials of which it was built; the dangerous state was disclosed to view, but not in any way caused, by the pulling down of the adjoining premises; as to the front wall reparation was impossible, the bricks were in a state in which they could not be used again, and the mortar had perished so that the wall was really nothing more than a pile of dry bricks. The back wall was not quite so bad, but the whole of it above the second floor required rebuilding, and the greater part of the walls below that point required to be renewed. And, having regard to the condition of the whole building, repair was at the date of the notice practically impossible: the only thing which could be done was to pull down and rebuild. There was evidence that the house must have been much in the same state for a considerable time.

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Jenkins, K.C., and *H. Greenwood*, for the plaintiff. The plaintiff has the lease vested in her as trustee for the company, and is therefore entitled to sue on the covenant. The covenant of the lessor, by which the defendant is bound, is to keep the outside of the demised premises in good and substantial repair. It is clear upon the authorities that such a covenant imposes a liability to put in repair if necessary: *Jacob v. Down*. (1) It makes no difference, therefore, if the building was out of repair in 1890 when the lease was granted. The lessor granted a lease of premises to be used for a particular purpose and bound the lessee to use them for that purpose only. She is bound to keep them in such a state of repair as is reasonable for that purpose.

Upjohn, K.C., and *Manning*, for the defendant. There has been no breach of the covenant. A covenant by a lessor to keep premises in repair does not bind him to do any repairs until he has notice from the lessee that the premises are in need of repair: *Makin v. Watkinson* (2); and that rule has been applied even

(1) [1900] 2 Ch. 156.

(2) (1870) L. R. 6 Ex. 25.

WARRINGTON J. where the lessor has power to enter and view the state of repair :
Hugall v. M'Lean. (1)

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The same case shews that a covenant to keep drains in repair does not bind a lessor to remedy a structural defect.

The defendant had no notice of any want of repair until July 13, 1905, and the evidence shews that on that day the state of things was such that it was impossible to repair the walls ; the only thing to be done was to pull them down and build new ones. The only question is whether under this covenant the lessor is bound to give the lessee a new house in place of an old one. In the case of a similar covenant by a lessee it is settled law that he is not so bound. He is only bound to keep the premises in a reasonable state of repair, having regard to their age and character. In *Gutteridge v. Munyard* (2) Tindal C.J. said : " It is not meant that the old building is to be restored in a renewed form at the end of the term, or of greater value than it was at the commencement of the term."

That statement was approved in *Payne v. Haine* (3), and it follows that if repair is impossible the covenantor is not bound to rebuild : *Lister v. Lane.* (4) The same reasoning applies to a covenant by the lessor. In *Jacob v. Down* (5) there was no question of replacing old buildings by new, the buildings would, if the lessee's covenants had been performed, have been new. [They also referred to *Wright v. Lawson.* (6)]

Jenkins, K.C., in reply. All the cases cited relate to covenants by lessees, but the obligation in such cases is "to put and keep the premises in such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a tenant of the class who would be likely to take it" : *Proudfoot v. Hart.* (7) The obligation of a lessor cannot be less than this. In this case it is more, for the Court cannot ignore the fact that the lessor has let the house for a particular purpose, and is bound by his covenant to keep it reasonably fit for that purpose. In *Lister v. Lane* (4) the Court held that the decay of

(1) (1884) Cab. & E. 391 ; (1885) 53 L. T. 94. (3) (1847) 16 M. & W. 541.

(4) [1893] 2 Q. B. 212.

(2) (1834) 7 C. & P. 129, 132 ; (5) [1900] 2 Ch. 156.

1 Moo. & R. 334, 336. (6) [1903] W. N. 108.

(7) (1890) 25 Q. B. D. 42.

the house was due to an original structural defect, so that case does not apply.

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WARRINGTON J. The only question in this case with which I propose to deal is the construction and effect of the covenant by the lessor "that the lessor will at all times during the said term keep the outside of the said premises in good and substantial repair."

I find as a fact on the evidence of the district surveyor that the building in question, which was about 200 years old, was absolutely worn out and had come to the end of its time. Its condition was not due to any neglect on the part of the lessor, but to the effect of time and the elements on the materials used. It was found on the survey that the front wall was beyond repair; nothing could be done to make it safe without rebuilding. The bricks had come to such a state that they could not be used again, and the mortar was perished to such an extent that the whole of the wall above the first floor, i.e., the whole front wall of the demised premises, really consisted of nothing but a heap of dry bricks. The back wall, being of much smaller extent, was not in such a bad condition, parts of it might have been preserved, but I find as a fact that the whole of the back wall above the level of the second floor would have had to be rebuilt, and it is very probable that when the work was begun it would be found necessary to rebuild both walls lower down, even below the level of the first floor.

I find therefore as a fact that on July 13, 1903, repairing the building, in the ordinary sense, was impossible. Nothing could be done but rebuild. It was not merely that rebuilding was the course which a prudent owner would have adopted as the best, but it was the only practicable course to make the building stand.

On those facts what is the law? It is settled—at least, so far as I am concerned—that a covenant by a lessor to repair the external wall or any part of a building is a covenant to repair on notice, and not otherwise. In *Makin v. Watkinson* (1) the point came before the Court of Exchequer in a very neat form. There

(1) L. R. 6 Ex. 25, 28.

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the action was brought upon a covenant to keep the main walls, main timbers, and roofs of the said buildings in good and substantial repair, order and condition, the same words as we have here with the addition of order and condition. There was a plea of no notice, to which the plaintiff demurred. The Court held that it was a good plea. It is rather important to see how Bramwell B., who gave his judgment with some reluctance, felt himself bound to come to this conclusion. He said: "I am also of opinion that the plea is good. To hold it to be so we must hold the defendant's covenant to be a covenant to repair on notice. I have the strongest objection to interpolate words into a contract, and think we ought never to do so unless there is some cogent and almost irresistible reason for it, arising from the absurdity of the contract if it is read without them. Does such a reason, then, exist here? I think it does. I think that we are irresistibly driven to say that the parties cannot have intended so preposterous a covenant as that the defendant should keep in repair that of which he has no means of ascertaining the condition." Channell B. concurred; Martin B. dissented. The point came before the Court of Appeal in *Hugall v. M'Lean*. (1) There, as here, the lease contained a covenant by the lessee to repair the inside of the premises, and to allow the lessor to enter and view the state of repair. The jury found that the defendant did not know of the want of repair, but had the means of knowing. But when the case came before the Court of Appeal, Brett M.R. treated *Makin v. Watkinson* (2) as having settled the law, and said that it had been followed in other cases, and no doubt many covenants in leases had been drawn upon the faith of the interpretation placed on the covenant in that case. It is, therefore, not open to me to decide otherwise than that there was no breach of the covenant until the landlord had notice of the want of repair. It is not necessary to decide whether the notice must come from the tenant, but I think that it must be from the tenant, and not aliunde. There was, therefore, no breach until July 13. Was there a breach afterwards? That depends on the state of the house at that date. I have stated the condition of the house, and I think there was no breach of the

(1) 53 L. T. 94.

(2) L. R. 6 Ex. 25, 28.

lessor's covenant to repair. It will be sufficient to take the law from *Lister v. Lane*. (1) I admit there is some difference between that case and this, but the principles there laid down substantially govern the law I have to apply. Lord Esher says, quoting from Smith's *Landlord and Tenant*, 3rd ed. p. 302: " 'These cases establish that, when there is a general covenant to repair, the age and general condition of the house at the commencement of the tenancy are to be taken into consideration in considering whether the covenant has been broken; and that a tenant who enters upon an old house is not bound to leave it in the same state as if it were a new one.' You have to consider not only what the damage is—what is the amount of repair required—but also whether the covenant has been broken. That I take to be the right rule, and it is derived partly from the summing up of Tindal C.J. in *Gutteridge v. Munyard* (2), which is always cited on this point. The learned Chief Justice said: 'Where a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term, or of greater value than it was at the commencement of the term. What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss, which, so far as it results from time and nature, falls upon the landlord.' " The judgment of Cave J. in *Proudfoot v. Hart* (3) is much to the same effect. He says: "So with regard to the walls, the floor, the doors, the windows, and all the different parts of the house, the tenant is bound where there is a breakage—whether arising from his own family or from some external accident—to repair it to the best of his ability; but he is never bound, when a portion of the structure has become absolutely worn out and necessary to be replaced, to substitute a new structure in the place of it. All that he undertakes to do is to patch the thing up so long as it is, in the nature of things, right and reasonable that the thing should be patched up. But, where it has got to such a state that patching up is of no avail—and we all know that things do at last get to

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(1) [1893] 2 Q. B. 212, 215. (2) 7 C. & P. 129; 1 Moo. & R. 334, 336.

(3) 25 Q. B. D. 42, 45.

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that state—then the tenant is not bound to put in anything new, or to pay any proportion of the cost of putting in the new thing, because the old one has become unfit to discharge its duty.”

Both those cases were decided on the liability of the lessee in respect of a lessee's covenant, and it is contended that they do not apply to a covenant by the lessor. But, in my judgment, there is no difference in principle. If the lessee is not bound to give back to the lessor at the end of the term a different thing from that which was demised to him, neither, in my judgment, is the lessor bound, by a similar covenant, to give to the lessee during the term a different thing from that which the lessee took from him at the beginning of his tenancy. If that distinction is unsound, every word of Lord Esher's judgment in *Lister v. Lane* (1) applies to the present case, and to the state of this house on July 13, 1903. The house had got to the state described by Cave J. in the passage I have read when patching up was of no avail. It had by its own inherent nature fallen into the condition in which it was then found to be. Then repairs were impossible, and it was necessary to rebuild the front wall and the greater part of the back wall, to do which was not within the lessor's covenant.

It is said I must put *Lister v. Lane* (2) out of account, because the state of the building in that case was stated to have arisen from faulty construction. That is true, and probably the collapse happened sooner than it would have done if the construction had been different. But in this case also the state of the house was the result ultimately of faulty construction. Houses can be built so as to last considerably more than 200 years without becoming dangerous. But the state of this house resulted from the effect of time upon the materials used, and the method of construction adopted. So in this respect also *Lister v. Lane* (2) is an authority in the defendant's favour. It is said that this construction will inflict great hardship upon the lessee. But to construe the covenant the other way would inflict an equal hardship on the lessor. I must put aside all questions of hardship, and can only look at the legal construction of the covenant.

(1) [1893] 2 Q. B. 215.

(2) [1893] 2 Q. B. 212.

I decide, therefore, that there has been no breach of the covenant, and judgment must be given for the defendant with costs.

Solicitors: *Richardson Sowerby, Holden & Co.; Claremont & Haynes.*

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BLAIBERG v. KEEVES.

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[1905 B. 3149.]

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May 7.

Vendor and Purchaser—Sale by Auction—Particulars—Misrepresentation—Property described as Freehold—Conditions—Title—Purchaser required to assume Facts—Long Term—Enlargement into Fee Simple—Presumption of Release of Rent—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 65.

The vendor put up for sale by auction property described as “an eligible freehold investment comprising a house and shop No. 249, Whitechapel Road.” One of the conditions of sale was “The property was formerly held with other property under an indenture of lease dated January 31, 1672, for a term of 500 years at a yearly rent of 1s., but the property was assigned in the year 1828 free from the said rent, which has never been paid by the vendor, and the purchaser shall assume that the said rent has been released and is not now charged upon the property sold. By a deed poll in 1902 under the provisions of the Conveyancing Act, 1881, the property was expressed to be enlarged by the beneficial owner into a fee simple. . . . It shall be assumed that the said deed poll operated as an effectual enlargement according to its tenor.”

The lease was from the lord of the manor of Stepney. The facts stated in the condition were true, and the property had been assigned to the vendor in 1902 as free from the rent, but subject to the lease, but in the abstracted deeds between 1828 and 1902 it was described as held at a rent of 1s. The purchaser objected that the assumption he was required to make in the particulars was to the vendor's knowledge untrue and the statement in the particulars that the property was freehold was a misrepresentation, and brought this action for rescission of the contract and return of his deposit. It was proved at the hearing that a search in the records of the manor shewed that no rent had been paid for fifty years, and there was no certain evidence that it had ever been paid at all :—

Held, that the vendor might reasonably believe that the property was freehold and was therefore justified in so describing it in the particulars,

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and then, by the conditions, requiring the purchaser to assume the facts establishing the freehold title, which the vendor knew he would have a difficulty in proving. There was therefore no misrepresentation.

Torrance v. Bolton, (1872) L. R. 14 Eq. 124; 8 Ch. 118, distinguished.

On June 7, 1905, the defendant put up certain properties for sale by auction. Lot 3 was described as "an eligible freehold investment comprising a capital house and shop, situate and being No. 249, Whitechapel Road . . . let on lease to Messrs. McKay & Ryland for a term expiring Lady Day, 1933, at a rent of 118*l.* per annum.

The fifth condition of sale, so far as it concerned lot 3, was in the following terms:—

"5. The title shall commence: As to lot 3 with a will of a testator, who died in 1833, which contains a specific devise of the property and no proof shall be required of the testator's seisin or ownership, and no purchaser shall require the production of, or investigate, or make any requisition or objection in respect of the prior title, whether the same shall appear to be in the vendor's possession or power or not. The property comprised in lot 3 was formerly held with other property under an indenture of lease dated January 31, 1672, for a term of 500 years, at a yearly rent of 1*s.*; but the property was assigned in the year 1828 free from the said rent, which has never been paid by the vendor, and the purchaser shall assume that the said rent has been released, and is not now charged upon the property sold. By a deed poll in 1902, under the provisions of the Conveyancing and Law of Property Act, 1881, the property was expressed to be enlarged by the beneficial owner into a fee simple. No objection or requisition shall be made on account of the lease dated January 31, 1672, or a copy thereof, not being forthcoming or as to the contents thereof, or the identity of the parcels or otherwise in relation thereto, and it shall be assumed that the said deed poll operated as an effectual enlargement according to its tenor."

The defendant attended the auction and purchased lot 3 for 2425*l.*, paid a deposit of 242*l.* 10*s.*, and signed the usual contract. An abstract was delivered according to the contract, commencing with the will of Jonathan Murray, who died in 1833, as in the

conditions mentioned. It shewed that in an assignment dated April 25, 1865, the property was described as "a leasehold house and shop held under a lease dated January 31, 1862, for a term of which the residue of 307 years was unexpired at January 31, 1865, at the yearly rent of 1s.

The same description was repeated in ten subsequent deeds, being all the abstracted deeds, which contained a particular description, prior to the assignment to the vendor. The assignment to the vendor was dated September 29, 1902. It contained a recital that at the death of Jonathan Murray these premises were absolutely vested in him for all the residue of a term of 500 years created by an indenture of lease dated January 31, 1672, but free from the rent thereby reserved. And the property was assigned by persons deriving title to undivided shares under his will to the purchaser "to hold the same unto the purchaser for all the residue now unexpired of the said term of 500 years granted by the said indenture of lease, but subject to the lessee's covenants and conditions therein contained, so far as they affect the hereditaments hereby conveyed."

By a deed poll under his hand, dated December 16, 1902, the vendor, after reciting that he was beneficially entitled to the property for the residue of the term of 500 years created by the said indenture of lease without any trust or right of redemption affecting the said term in favour of any person entitled in reversion expectant thereon, and without any rent now subsisting incident to the reversion, declared in exercise of the power given by the Conveyancing and Law of Property Act, 1881, that the aforesaid term and the residue thereof should be and was thereby enlarged into the fee simple, to the intent that the fee simple in the said hereditaments should be vested in the vendor.

The vendor produced to the purchaser an assignment, dated June 31, 1828, by which the property was assigned "for the residue of the term of 500 years, free and clear of and from the said annual rent of 1s. reserved by the said original indenture of lease, but subject to the covenants and agreements in the lease so far as the same extended or applied."

The purchaser delivered requisitions in which he objected

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WARRING- that "the assumptions required to be made by condition 5 seem,
TON J. to the knowledge of the vendor, not to be in accordance with
1906 the facts, and accordingly are not binding on the purchaser,
BLAIBERG with the result that so far as concerns him the property is, as in
v. fact it is, leasehold and not freehold as described in the particulars.
KEEVES. Under these circumstances the contract is not binding on the
purchaser."

The vendor replied that he relied on the contract.

Some correspondence followed, but the purchaser adhered to his objection, and on August 16, 1905, brought this action for a declaration that he was induced to enter into the agreement of June 7, 1905, by the misrepresentation of the defendant and for rescission of the contract and return of the deposit.

After the commencement of the action the defendant obtained a conveyance to him of the reversion expectant on the lease of 1672.

Jenkins, K.C., and *W. M. Spence*, for the plaintiff. The property which is in question in this action was originally held under a lease for 500 years at the rent of 1s. The question is whether it has become freehold. The defendant has purported to enlarge the term into a fee simple by a deed executed under s. 65 of the Conveyancing and Law of Property Act, 1881. (1)

The Legislature seem to have forgotten, in framing that section, that the Statutes of Limitation have no effect upon a conventional rent as between landlord and tenant, except as to the amount of arrears which can be recovered, but the point is

(1) "Where a residue unexpired of not less than two hundred years of a term, which, as originally created, was for not less than three hundred years, is subsisting in land, whether being the whole land originally comprised in the term, or part only thereof, without any trust or right of redemption affecting the term in favour of the freeholder, or other person entitled in reversion expectant on the term, and without any rent, or with merely a peppercorn

rent or other rent having no money value, incident to the reversion, or having had a rent, not being merely a peppercorn rent or other rent having no money value, originally so incident, which subsequently has been released, or has become barred by lapse of time, or has in any other way ceased to be payable, then the term may be enlarged into a fee simple in the manner, and subject to the restrictions, in this section provided."

well settled: *Grant v. Ellis* (1); *Archbold v. Scully* (2); *Irish Land Commission v. Grant*. (3)

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The rent had therefore not ceased to be payable from lapse of time when the deed of enlargement was executed, and the deed is bad because the original rent of 1s. is one having a money value.

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The statement in the particulars that the property was freehold was untrue, and the vendor knew it was untrue. The proper function of the particulars is to define the nature of the property. The purchaser cannot be bound to correct a misdescription in the particulars by a reference to the conditions: *Torrance v. Bolton* (4); and the condition is itself misleading. It requires the purchaser to assume what is clearly not true. The defendant alleges that since action brought he has procured a conveyance of the reversion from the lord of the manor of Stepney, but when a purchaser discovers a defect in title and promptly repudiates the contract, he is not bound to accept an after-acquired title.

Upjohn, K.C., and *Methold*, for the vendor. The condition is fair, for the vendor believed the land to be freehold, and we contend that in fact it was freehold. The condition is binding unless the vendor has stated something which is untrue, or omitted something the omission of which makes what he has stated untrue: *In re Sandbach and Edmondson's Contract*. (5) Here the facts stated in the condition are true. We have proved more than is there stated. And the facts are such that, upon proof thereof, a jury would probably be directed to presume that there had been a release of the rent. The point was considered in *In re Scott and Alvarez's Contract* (6), where it was held that a condition of the same kind as that in the present case was binding, unless the purchaser could shew, not merely that there were doubts as to the title, but that the title was bad. The case came on again upon further evidence (7), and the purchaser proved that the title was bad; but the Court of Appeal, though

(1) (1841) 9 M. & W. 113, 124.

(2) (1861) 9 H. L. C. 360.

(3) (1884) 10 App. Cas. 14, 26.

(4) L. R. 14 Eq. 124; 8 Ch. 118.

(5) [1891] 1 Ch. 99.

(6) [1895] 1 Ch. 596.

(7) [1895] 2 Ch. 603.

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they refused specific performance, held that the purchaser was not entitled to the return of his deposit. The question in these cases is what is to be the construction of the condition. If it be that the purchaser is to take such title as the vendor has, even the fact that the vendor's statement is untrue will not enable the purchaser to recover his deposit: *Corrall v. Cattell*. (1) That case also shews that the conditions are the proper place for a provision of this kind. It would be quite reasonable to presume a release in this case. It is stated in *Eldridge v. Knott* (2) that even a charter has been presumed, and in *Jeffreys v. Machu* (3) and *In re Lidiard and Jackson's and Broadley's Contract* (4) presumptions of the same character were made. The rent of a shilling, reserved by the lease, may fairly be said to have no money value: see *In re Chapman and Hobbs* (5); *In re Smith and Stott* (6); but even if it had a money value it was quite fair to ask the purchaser to assume that there had been a release, and if there had, the deed enlarging the term was clearly within s. 65 of the Conveyancing Act, 1881. If the plaintiff's argument were sound all conditions would always have to be stated in the particulars. *Torrance v. Bolton* (7) was a totally different case. There the property was described in the particulars as an absolute reversion, and the conditions attempted to bind the purchaser to take an equity of redemption.

Jenkins, K.C., in reply. The land was not freehold, and it was misleading and unfair to ask the purchaser to assume that it was. It cannot be said that there would have been any defence to an action for the rent. There would have been no ground for leaving any question as to a release to a jury. *Eldridge v. Knott* (2) expressly decides that mere non-payment gives no reason for presuming a release of rent. Presumptions are made only to quiet possession by giving a legal origin to a right long exercised, not to put an end to a right. The vendor's statement in the particulars that the land was freehold is a misrepresentation of fact, that cannot be set right by the

(1) (1839) 4 M. & W. 734.

(4) (1889) 42 Ch. D. 254.

(2) (1774) 1 Cowp. 214.

(5) (1885) 29 Ch. D. 1007.

(3) (1860) 29 Beav. 344.

(6) (1883) 29 Ch. D. 1009, n.

(7) L. R. 14 Eq. 124; 8 Ch. 118.

conditions: *Torrance v. Bolton* (1); and the purchaser did not read the conditions, but it makes no difference whether he did or not, for the facts stated in the conditions afford no ground for the assumption he is asked to make.

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WARRINGTON J. This is an action by a purchaser of land seeking recovery of the deposit made by him upon the signature of the contract, on the ground, as he alleges, that he was induced to enter into the contract by the misrepresentation of the defendant, and is entitled to have the contract rescinded. The short point is that the particulars of sale described the property as freehold, and, the purchaser says, the property is not in fact freehold but leasehold, and he was induced to enter into the contract by the statement that it was freehold, and is entitled to rescind.

The facts are these: The property was originally held under a lease for 500 years granted in 1672 and reserving a rent of 1s. The lessor was the lord of the manor of Stepney. Search has been made in the records of the manor, and it is enough for me to say that, so far as the records go, from the date of the lease to the present time there is no certain record of rent having been paid in respect of the property comprised in the lease. And for the last fifty years, at any rate, it may be taken that the rent has not been paid. The property was purchased by the vendor as leasehold in 1902 and the vendor thereupon executed a deed poll under the Conveyancing and Law of Property Act, 1881, s. 65, purporting to enlarge the leasehold interest which he had so acquired into a fee simple. In 1905, having as he supposed enlarged the leasehold into a freehold, he put it upon the market for sale by auction. Lot 3, which was the property in question in this action, was described in the particulars of sale as "An Eligible Freehold Investment, comprising a capital house and shop, being No. 249, Whitechapel Road." The conditions of sale contained the following provision. [His Lordship read condition 5 set out above, and continued:—] An abstract of title was duly delivered, commencing as provided in the condition. It contained abstracts of several

(1) L. R. 14 Eq. 124; 8 Ch. 118.

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modern deeds in which the property was described as a leasehold house and shop held for a term of which the residue of 307 years was unexpired at January 31, 1865, at the yearly rent of 1s. But the deed of 1828 by which it was assigned as free of rent, but subject to the lease, was produced to the purchaser, and it was so described in the assignment to the vendor in 1902.

I think I have now stated all the material facts. The question whether the property was freehold, if it had to be decided, would depend upon whether the deed poll of 1902 was effectual under the statute to enlarge the term into a fee simple. That depends on s. 65 of the Conveyancing and Law of Property Act, 1881. [His Lordship read that section, and continued :—]

I assume for the purposes of my judgment that a rent of 1s. is a rent "having a money value." I assume also that the rent is not barred by lapse of time (I think that is clear). The question therefore resolves itself, so far as the effect of the deed of 1902 is concerned, into the question whether this rent had been released prior to the deed of 1902.

That being the state of things, and the vendor being in the difficulty of having no evidence of actual release, he inserted in the contract the provision I have read. He states there the facts, which were within his own knowledge, the assignment in 1828, free from the said rent, and that rent had never been paid by the vendor. Those facts were true, and have not been disputed. Then he goes on, "And the purchaser shall assume that the said rent has been released and is not now charged upon the property sold." Now were those particulars and conditions misleading? Or was the statement in the particulars a misrepresentation? In my opinion the plaintiff has not shewn that the statement in the particulars, that the property was freehold, was false. It is at least an open question whether in fact there had been a release or not. I am asked to say that it is impossible to presume from the non-payment of rent that there was a release. But that is not a question which I have to decide. It seems to me that it is sufficient if the vendor might reasonably believe, on reasonable grounds, that there might have been a release, and therefore might reasonably believe that the statement he made was true. I think he might. Upon the facts as I have stated

them it was quite an open question whether, if they had been stated to a jury, the jury would not have found that the rent had been released. If that is the true view there is an end of the plaintiff's case. All that the vendor has done is to describe the property as being held upon a particular tenure, which he believed, and reasonably believed, on sufficient grounds, might be the true tenure on which it was held. Then, knowing that he might have a difficulty in proving the fact of freehold tenure, in the proper part of the document, i.e. the conditions, which shew how he is going to establish his title, he throws upon the purchaser the burden of assuming the facts the proof of which might have been difficult. Thus stated, I think the case comes within the principles of *In re Sandbach and Edmondson's Contract*. (1)

But before I part with the case I must say a word about *Torrance v. Bolton* (2), which was very much relied on by the plaintiff's counsel.

In that case the particulars of sale described the property as an absolute reversion. The conditions pointed out that the reversion, the property, was subject to certain incumbrances and required the purchaser to take a conveyance subject to the incumbrances. Under those circumstances the purchaser brought an action for rescission of the contract and return of his deposit, and both Malins V.-C. and the Court of Appeal decided that he was entitled to succeed. But what was the nature of the plaintiff's complaint? It was that the statement in the particulars was untrue. The vendor was not entitled to an absolute reversion, but only to a reversion subject to incumbrances. All that either Court decided was, that the vendor was not entitled to say to the purchaser, "You are told by another document, the conditions,—the function of which is not to correct the statement of fact in the particulars,—that the statement of fact in the particulars is incorrect." The Court of Appeal adopted the answer, which the purchaser might have made, that he was not bound to look at the conditions to correct a statement in the particulars. That is what was decided in *Torrance v. Bolton* (2) and it is clearly distinguishable from the present case. Here the property was described as freehold. It

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(1) [1891] 1 Ch. 99.

(2) L. R. 14 Eq. 124; 8 Ch. 118.

WARRING- may or may not in fact be freehold, but the question whether it
 TON J. / was so or not was a question of title. It is not the function of
 1906 the particulars to deal with title at all; that has to be dealt with
 BLAIBERG on evidence, and it is the function of the conditions to state
 r. what evidence of title the purchaser is to have. So the plaintiff
 KEEVES. was entitled to describe the property in the particulars as
 freehold, and when he came to the conditions, to say, "You, the
 purchaser, shall accept certain facts as proved, and upon that
 evidence shall accept the statement made in the particulars." The
 result is that the action fails and must be dismissed with
 costs.

Solicitors: *Pedley, May & Fletcher; Bolton & Co.*

J. R. B.

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[1905 P. 1663.]

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Charitable Bequest—Bell-ringing in Commemoration of the Restoration of the Monarchy—Tombstones for Pensioners—"Public Charities and Institutions or charitable purposes for the public advantage" to be selected by the Trustees—Uncertainty—Overriding charitable Intent.

A testatrix bequeathed—(1.) 200*l.* to the vicar and churchwardens of A., the income to be distributed annually at Christmas as to the sum of 1*l.* to the ringers of the church who should ring a peal of bells on the anniversary of the restoration of the monarchy in commemoration of that event; (2.) 700*l.* to the vicar and churchwardens of B., the income to be applied in (among other things) the erection and maintenance of headstones to the graves of pensioners in the almshouses at B. who should be buried in the churchyard of B. Church; (3.) the residue to trustees in trust to pay and distribute the same amongst "such public charities and institutions or for such charitable purposes for the public advantage" as the trustees should think fit:—

Held, that all the gifts were effectual charitable bequests.

MRS. E. M. PARDOE by her will dated May 11, 1901, appointed the plaintiffs executors thereof, and made the following charitable bequests:—

By clause 15 the testatrix bequeathed the sum of 200*l.* to the vicar and churchwardens for the time being of the parish of

Cirencester to be invested by them in the names of the Official Trustees of Charitable Funds, and the income thereof to be distributed annually at Christmas, “as to the sum of 1*l.* to the ringers for the time being of the parish church of Cirencester, who shall ring a peal of bells from 6 to 7 o’clock in the forenoon on each 29th day of May in commemoration of the happy restoration of the monarchy to England” ; and as to the residue, among the poor of the parish being members of the Church of England at the discretion of the vicar and churchwardens. By clause 17 she bequeathed the sum of 700*l.* to the vicar and churchwardens for the time being of Cleeton St. Mary, in the parish of Bitterly, to be invested by them in the names of the Official Trustees of Charitable Funds, and the income thereof to be applied in or towards (inter alia) “(5.) the erection and maintenance of headstones to the graves of any persons who at the dates of their death were resident as pensioners in the almshouses at Cleeton aforesaid erected by my late husband, and who shall be buried in the churchyard of the said church of Cleeton aforesaid.” By clause 20 the testatrix bequeathed the net proceeds of her real and personal residuary estate to the plaintiffs in trust to pay and apply and distribute the same “to and amongst such public charities and institutions or for such charitable purposes for the public advantage or benefit as” the plaintiffs “or the trustees or trustee for the time being of this my will shall in their absolute discretion consider worthy and fitting objects to receive the same or any part thereof.”

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The testatrix died on July 15, 1903.
This was an originating summons taken out by the executors of the will to determine the validity of the above-mentioned charitable bequests.
The question as to the validity of the gift to the bell-ringers was first dealt with.

Stewart-Smith, K.C., and *Cann*, for the executors.
R. J. Parker, for the Attorney-General.
Jennings, for the vicar and churchwardens of Cirencester. This is a gift for charitable purposes within Lord Macnaghten’s definition in *Commissioners for Special Purposes of Income Tax v.*

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Pemsel. (1) The object of the gift is distinctly religious. There was formerly a special church service to commemorate the restoration, and it is still a day of thanksgiving. Moreover, it is a gift for the benefit of the community, since it is a gift in furtherance of monarchical institutions: *In re Scowcroft* (2); *Attorney-General v. Oakaver*. (3)

P. O. Lawrence, K.C., and T. T. Methold, for the next of kin. This gift does not fall under any of the four heads of Lord Macnaghten's definition.

KEKEWICH J. The bells are to be rung on each 29th of May, being the anniversary of the restoration of the monarchy, in commemoration of that happy event. Now what does that mean? As I understand it, the object of the gift was that the restoration of the monarchy should be brought back to the memories of those who listened to the ringing of the bells, and the testatrix speaks of it as a happy restoration, about which, of course, no Englishman can express a doubt at the present moment. The notion of the testator evidently is that it shall bring back happy thoughts; and, seeing that this is to be brought about by listening to a peal of bells rung in a church tower, I think that those happy thoughts necessarily connote a feeling of gratitude to the Giver of all good gifts. I think I can see that in the testatrix's mind, as expressed in her words. If that is so, I do not think there is any doubt that it is a good charitable gift.

As regards what I have said about the peal of bells being rung in a church, and connoting, not necessarily a religious service, that is to say, a service which is being conducted in the church for the moment, but a notion of worship and gratitude to Heaven, I will not quote, but I will refer those who are less well acquainted with the lines than I am to the scene in the *Forest of Arden* and what is said there about peals of bells. (4) I declare that this is a valid and effectual bequest.

(1) [1891] A. C. 531, 583.

(2) [1898] 2 Ch. 638.

(3) Cited in 1 Ves. Sen. 536.

(4) "If ever you have looked on better days;

If ever been where bells have knolled to church."

As You LIKE IT. Act ii., scene 7.

The question of the validity of the gift for the erection of headstones was next discussed.

Fischer Williams, for the vicar and churchwardens of Cleeton St. Mary. No doubt this is not a gift for the general up-keep of the churchyard, but it is a gift to provide tombstones for the poor. That is a benefit the duty to confer which has been made the foundation of the wider duty of keeping the churchyard in repair: *Coke's Second Institute*, p. 489, quoted in *In re Vaughan*. (1)

This is not a gift for the erection of one particular tombstone, but is a gift for the erection of tombstones for a particular class of the poor. It is therefore a good charitable gift within the principle of *In re Manser*. (2)

R. J. Parker, for the Attorney-General.

P. O. Lawrence, K.C., and *T. T. Methold*, for the next of kin. To hold this gift charitable is to go beyond the authorities. Headstones are not necessary for the maintenance of the churchyard, and to a great extent they have fallen into disuse.

KEKEWICH J. I have before me a passage in the judgment of Warrington J. in *In re Manser* (3), which I will read. Referring to the case of *In re Vaughan* (1), before North J., he says: "But I think that he did decide it on the broader ground. If one looks at the passage which Mr. Beaumont referred to on p. 192, where the learned judge sums up what he had been saying in reference to the Church Building Act, I think one can see what his true view was. He says: 'To put it shortly, I do not see any difference between a gift to keep in repair what is called "God's house," and a gift to keep in repair the churchyard round it, which is often called "God's acre."' That is the ground on which I think this case, as I have already said, can be decided in favour of the legacy; and I think North J. took the same view."

The only attempt to answer that in this case is that erecting headstones is not a repair of the churchyard, partly because

(1) (1886) 33 Ch. D. 187, 191.

(2) [1905] 1 Ch. 68.

(3) [1905] 1 Ch. 74.

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KEKEWICH headstones are unnecessary and partly because they have fallen into disuse. Unnecessary in one sense, of course, they are. Everything is unnecessary except putting the coffin into the ground and covering it over decently; and "decently" is limited to so covering it over that the coffin may be removed from the ravages of dogs and the eyes of people. The grave may be as untidy as may be, and yet be decent. The object here is to make it neat: to shew what it is; nothing more. As regards disuse, I suppose if headstones really are abandoned and they cannot be erected any longer because those who control the churchyard will not allow it, or because public opinion sets in against it, then this charity must be administered *cy-pres*; but I venture to say, relying on my own knowledge of what occurs around me and with no evidence on the subject, that the headstone has not yet fallen into such disuse that it may not be regarded by a very large proportion of the people as a proper way of marking a grave and recording the name and age of the person buried there, and adding to the decency and repair of the churchyard. Therefore in my opinion this also is a valid and effectual gift.

The residuary gift was then dealt with.

P. O. Lawrence, K.C., and *T. T. Methold*, for the next of kin.

1. The gift of residue is void for uncertainty. The testatrix, instead of making a will for herself, is in effect delegating the power of making a will to her executors after her death, and that is contrary to law: *Grimond v. Grimond* (1); *Williams v. Kershaw*. (2) *In re Allen* (3) is distinguishable, because there the gift was for the benefit of the inhabitants of a particular place.
2. This gift includes objects which are not charitable. It is a gift to "such public charities and institutions" as the trustees shall think fit. Assuming that public institutions necessarily imply charity, we say upon the construction of the gift that the word "public" applies to "charities" only, and not to "institutions."

{1} [1905] A. C. 124.

(2) (1835) 5 Cl. & F. 111.

(3) [1905] 2 Ch. 400.

R. J. Parker, for the Attorney-General. A gift "to such charitable purposes as my executors shall think fit" is a common form of bequest, and Lord Halsbury in *Grimond v. Grimond* (1) did not intend to say that that was bad; but that was a Scotch case, and the gift in that case was to "such charitable or religious institutions" as the trustees should select, and religious purposes being by the law of Scotland not necessarily charitable, and there being, consequently, a power to select between purposes some of which were charitable and some of which were not, the Lord Chancellor held that the gift was void for uncertainty. So in *Blair v. Duncan* (2), where the gift was for such "charitable or public purposes" as the trustees should think fit, the House, treating the word "public" as meaning something wider than charitable, declared the gift void for uncertainty. But Lord Davey there said that, if the words had been merely "charitable purposes" or "charitable and public purposes," effect might have been given to them, the words in the latter case being construed to mean charitable purposes of a public character. Therefore the only question here is whether under this gift the trustees could properly select an object which was not charitable. I submit not. The predominant intention of the testatrix was charitable, and she meant to give the residue to such public charitable institutions or other charitable purposes for the public benefit as the trustees should select. This is, therefore, a valid bequest. That is the distinction drawn by Lord Davey in *Hunter v. Attorney-General*. (3)

T. T. Methold referred to the definitions of "public institution" in Stroud's Judicial Dictionary.

KEKEWICH J. It is not my intention to determine the question, which I understand from counsel is still open for argument, whether public institutions are necessarily charitable. It might be necessary to interpret the word "public"; it certainly would be necessary to interpret the word "institution." Until you can ascertain exactly what is meant by "public institution" it would be impossible to say whether there could fall within the class any

(1) [1905] A. C. 124.

(2) [1902] A. C. 37.

(3) [1899] A. C. 309, 323-4.

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KEKEWICH institution which was not charitable. I put that statement in
 J. the forefront, because I am anxious that no words that fall from
 1906 me may be treated as determining that point, or even indicating
 ~~~~~ any opinion upon it.

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As is universally the case when one has to interpret a will, the first thing to do is to ascertain what is the meaning of the will as it stands before applying to it any settled law or any cases which apparently bear directly on the construction. One has to see what the will says. This is a gift by the testatrix of residuary estate. The gift is : "To the trustees to stand possessed in trust to pay and apply and distribute the same to and amongst such public charities and institutions or for such charitable purposes for the public advantage or benefit as the trustees shall in their absolute discretion consider worthy and fitting objects to receive the same or any part thereof." Now, what is the class within the area of selection—or, to put it more broadly, is there a class marked out at all as an area for selection by the trustees? If there is no such class, then different observations may apply, and therefore I put the question in that way.

It seems to me that though the will is not framed accurately, and one has to puzzle a little to see what was intended, yet there is a distinct indication of the testatrix's intention that the selection shall be made from a particular class, and that that class is described with sufficient accuracy:—in the first place, public charities, secondly public institutions ; for I have no doubt that on the grammatical meaning of the will, "public" is attached as much to "institution" as to "charities." It is not unworthy of observation, though I think it would be foolish to attribute too much importance to a mere verbal criticism, that the testatrix does say "public charities *and* institutions." She does not say "public charities *or* institutions." She does not divorce "charities" from "institutions," but treats them as being connected together, and being both public. If the gift stopped there, there would have been more difficulty, but she goes on to say, "or for such charitable purposes for the public advantage or benefit as the trustees may select." If she had said, "or for such other charitable purposes," there really would have been no room for doubt as to her meaning. If she had used that



language, it would have been perfectly clear that everything she contemplated was charity. She has not said so in terms, and I do not propose to read in the word "other," but at the same time I think the language she has used affords a distinct indication of what she intended. Then, in reference to charitable purposes she uses these words, "for the public advantage or benefit," shewing that her mind ran on that "public" advantage which she had already mentioned in connection with charitable institutions. But the great point, to my mind, is that she says, "or for such charitable purposes." It seems to me impossible to construe that language as comprising anything which was not charitable. It seems to me that if these trustees were to select, assuming that it is possible to select, a public institution which is not charitable, then they would be doing that which the will does not allow, and that charity must really govern their selection. It is all coloured with the notion of charity.

If that is the right view of the case, it is not necessary to dwell upon the last argument addressed to me by Mr. Parker on the basis of Lord Davey's opinion in *Hunter v. Attorney-General* (1), nor is there any reason to distinguish this case from *Grimond v. Grimond* (2), because it cannot be that the House of Lords, in deciding *Grimond v. Grimond* (2) as they did, intended to overrule the principle of law laid down by Lord Davey in *Blair v. Duncan*. (3) He there says: "If, therefore, the words in the present case were merely 'charitable purposes,' or were 'charitable and public purposes,' I think effect might be given to them, the words in the latter case being construed to mean charitable purposes of a public character." That was entirely consonant with the acknowledged law that a testator may, if he pleases, devote money by his will to charity, leaving his executors to determine the precise charities to which the money is to be applied, and the proportions in which it is to be applied to two or more of them. It would be a mischievous thing to cast a doubt upon testamentary dispositions of that character, because they are common and frequently come before the Courts, and are very well known to those who are interested in

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(1) [1899] A. C. 323.

(2) [1905] A. C. 124.

(3) [1902] A. C. 37, 44.

KEKEWICH charitable objects. But it is said that this cannot be done here  
 J. because of the decision in *Grimond v. Grimond*. (1) The answer  
 1906 to that is that the decision there was entirely different. I do not  
 PARDOE, propose to read any portion of Lord Moncreiff's judgment in the  
*In re.* Court below; but it must not be forgotten that the Lord Chan-  
 McLAUGH- cellor refers to it, and so does Lord James specifically, and, I  
 LIN understand, Lord Robertson also, who expresses his concurrence  
 v. in what Lord James said. What the Lord Chancellor, who was  
 ATTORNEY- the only member of the House who explained the views at any  
 GENERAL. length, really said is this: "The testator has not decided  
 sufficiently for himself among what objects the distribution is to  
 be." I repeat I cannot consider him—having regard to the  
 settled law as laid down by Lord Davey in *Blair v. Duncan* (2)—  
 as saying that it is not allowable for a testator to give to his  
 executors the power of selecting charities within a certain area.  
 The words of the gift in *Grimond v. Grimond* (1) were: "Divide,  
 pay, and convey the same to and among such charitable or  
 religious institutions and societies . . . as my trustees or their  
 survivors or survivor of them may select, and in such proportions  
 to each or any as they may fix." That case came from Scotland,  
 and in Scotland a gift to a religious purpose is not necessarily  
 charitable. That, of course, introduces an additional compli-  
 cation which would not have arisen in an English Court, but  
 there is complication enough. It is, "such charitable or religious  
 institutions and societies." The Lord Chancellor does not pause  
 to consider how far the objects are charitable. He says (3):  
 "In my opinion the testator here has not given a class from  
 which he allowed his trustees to select individually, but he has  
 left his directions so vague that it is in effect giving someone  
 else power to make a will for him instead of making a will for  
 himself, which I conceive to be the objection always entertained  
 where the directions are so extremely vague that you cannot say  
 what it is that the testator meant." When once you arrive at  
 that, intestacy follows as a matter of course. The next of kin  
 are entitled to say, "We are only defeated by a testamentary  
 instrument which says precisely, either in direct language or by

(1) [1905] A. C. 124.

(2) [1902] A. C. 44.

(3) [1905] A. C. 126.

reference, to whom the testator's property is to go." If you do not find that specified in sufficiently distinct language, then the gift fails and the next of kin succeed by law. I understand the Lord Chancellor to mean that it was impossible to give effect to the gift in that case because no Court could have given the trustees directions as to what they ought to select. The Court had no guide to say whether this or that society was one which the testator meant. That does not apply to this case. For the reasons I have stated I think that this gift is good.

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McLAUGH-  
LIN  
v.  
ATTORNEY-  
GENERAL.

Solicitors: *Charles Sawbridge & Son; Peacock & Goddard, for Mullings, Ellett & Co., Cirencester; Treasury Solicitor; Lee & Pembertons.*

H. B. H.

SMITH v. PARINGA MINES, LIMITED.

KEKEWICH  
J.

[1906 S. 1102.]

1906

PARINGA MINES, LIMITED v. BLAIR.

April 11.

[1906 P. 744.]

PARINGA MINES, LIMITED v. BOYLE.

[1906 P. 748.]

*Company—Directors—Powers—Postponement of General Meeting.*

The directors of a limited company, in the absence of express authority in the articles of association, have no power to postpone a general meeting of the company properly convened.

THE Paringa Mines, Limited, was incorporated under the Companies Acts, 1862 to 1900, on April 17, 1902.

In February, 1906, there were only two directors of the company, Mr. John Blair, chairman, and Mr. Tilden Smith. Blair proposed to Tilden Smith that Mr. H. C. Foulkes should be appointed as a third director to fill up a casual vacancy which had recently occurred on the board, and on February 18 Tilden Smith received a notice calling a board meeting for February 21 at the company's offices. Tilden Smith did not attend the board meeting, but intimated by telephone that he would see Blair at

KEKEWICH his (Tilden Smith's) office at 2.30. Blair accordingly went there and saw Tilden Smith outside the door of his private room. He explained to Tilden Smith the necessity of appointing a director in the place of the director who had retired, and pointed out that he had nominated Foulkes and that there was no other nomination, and asked him if he objected. Tilden Smith said that he did, and Blair replied that by his casting vote he declared Foulkes duly elected, and the board meeting closed. The records were duly entered up and signed by Blair as chairman.

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LIMITED.  
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On March 28, 1906, Tilden Smith received a notice calling the annual ordinary meeting of shareholders for April 5, 1906, for the purpose of receiving the annual report and statement of accounts and of electing directors.

On the same March 28 Tilden Smith, on behalf of himself and all other the shareholders in the company, commenced an action against the company, Blair and Foulkes, for a declaration that an agreement entered into by the company for the purchase of certain mines in Australia was void, and an injunction to restrain the defendants from carrying it into effect, and also for a declaration that the appointment of Foulkes as director was illegal and an injunction to restrain him from acting as a director, and served a notice of motion on the defendants for injunctions in the terms of the writ.

On April 4, 1906, Tilden Smith received from the secretary of the company a notice purporting to postpone the meeting of April 5. The notice was dated April 3, and was in the following terms:—

“To the Shareholders.

“Notice of Postponement.

“Dear Sir (or Madam),—In view of the pending action instituted by Mr. Tilden Smith in the Chancery Division of the High Court of Justice challenging the legality of the constitution of the board and of the fact that Mr. Tilden Smith has to-day notified the company's bankers not to honour cheques on the company's account bearing the signature of one of the directors the board have decided with regret that it is impossible to hold the ordinary general meeting of the company as called for the 5th inst. The board have accordingly postponed the said meeting for three



weeks to enable a decision to be obtained from the Courts on these points and you will please therefore take this as formal notice of postponement of such meeting to same time and place on the 26th day of April, 1906.

“ By order of the board.

“ (Signed) F. Stobbs, Secretary.”

On the same day, April 4, Tilden Smith wrote to the secretary notifying him that as he had been advised that the attempted postponement was illegal the meeting would be proceeded with, and requiring him to be present at the meeting with all necessary papers, and he also caused a notice to be sent to the public Press that the ordinary general meeting would be held. This notice duly appeared in the *Financial Times* and other papers issued on April 5. Tilden Smith attended the meeting, at which there were about fifty shareholders present. After waiting for a quarter of an hour, the time fixed by the articles, for the arrival of the chairman of the company, Tilden Smith, being the only director present, explained that he did not wish to take the chair, and the chair was taken by A. J. Parker.

The meeting then unanimously passed resolutions re-electing Tilden Smith as a director, rejecting Foulkes as a director, and electing Cavendish Boyle and Parker as directors, and the meeting was then adjourned until April 26, the same day to which the secretary had purported to postpone the meeting by the notice of April 3.

On the same day, April 5, Tilden Smith convened a board meeting for April 6, which was attended by himself, Cavendish Boyle, and Parker. At this meeting C. S. Beale was appointed secretary of the company pro tem., and the late secretary was requested to hand over the books, papers, and seal of the company to the new secretary, but he declined to do so.

The articles of association of the company contained no provision for the postponement of a general meeting, but they empowered the directors to determine the time and place at which general meetings should be held (art. 66); and they also empowered the chairman of a general meeting, with the consent of the meeting, to adjourn the same from time to time and from place to place, provided that no business should be

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 —

transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place (art. 76). The articles also provided that, until otherwise determined by a general meeting, the number of the directors should be not less than three nor more than five (art. 88). They also provided for the retirement of the two senior directors by rotation at the ordinary general meeting in each year, and empowered the company at such meeting to fill up the vacated offices by electing a like number of persons to be directors and to fill up any other vacancies (arts. 94, 95, 96). Art. 100 provided that "any casual vacancy occurring among the directors may be filled up by the directors but any person so chosen shall retain his office so long only as the vacating director would have retained the same if no vacancy had occurred."

On April 6 the company, Tilden Smith, Cavendish Boyle, and Parker commenced an action against Blair, Foulkes, and Stobbs, and moved for an injunction in effect requiring the defendants to deliver over to the plaintiff directors or to Beale the books, papers, and common seal of the company.

On April 7 the company commenced an action against Cavendish Boyle, Parker, Tilden Smith, and Beale, and moved for an injunction to restrain the defendants other than Tilden Smith from acting as directors and secretary respectively of the company, and to restrain the defendant Tilden Smith from aiding and abetting the other defendants in so acting.

The three motions now came on for hearing together.

*P. O. Lawrence, K.C.*, and *Cozens-Hardy (Gore-Browne, K.C.*, with them), for the applicant in the motion in *Smith v. Paringa Mines, Ltd.*, and *P. O. Lawrence, K.C.*, and *Cozens-Hardy*, for the applicants in the motion in *Paringa Mines, Ltd. v. Blair*. We say, first, that Foulkes was not properly appointed a director; secondly, that the directors had no power to postpone a general meeting properly convened, and that Boyle and Parker were therefore properly elected directors. *National Dwellings Society v. Sykes* (1) is the authority which is most nearly in point.

*Peterson*, for the respondents in these two motions. If

Foulkes was not properly appointed the general meeting could not be called, and everything that passed there was invalid. If he was properly appointed there was power to postpone the meeting. If the directors have power to convene the meeting, it would seem to follow that they must have power to postpone. They are to determine the time and place of the meeting, and they may adjourn it. It is a common thing when an action is brought against a company for directors to undertake to postpone a meeting.

*Peterson* also appeared for the applicants in the third motion, and *Cozens-Hardy* for the respondents.

KEKEWICH J. It seems to me that Foulkes must be taken to have been duly elected director of this company. There was a vacancy on the board. According to the evidence, a board meeting was properly summoned for the purpose of filling up this vacancy. Tilden Smith did not attend. It is objected that Tilden Smith saw Blair in the passage outside his own office. There is no reason why a meeting should not be held in the passage. The two directors met there. Blair proposed the election of Foulkes as director. Tilden Smith objected. The directors were equally divided, one against one. Blair, being in the chair, gave his casting vote in favour of Foulkes. So far as I can see Foulkes was validly elected. That being so, it was competent for the board to convene a meeting of the shareholders, and a meeting was convened for a certain day. It matters not why, but Blair, not wishing the meeting to take place at the time and place at which it was convened, purported to postpone it by a notice of postponement. I will assume that that notice was duly issued by the authority of the board, and was given at the proper time and to every shareholder. I entirely agree with the opinion given by counsel that it was not competent for the board to postpone the meeting. The articles provide for the adjournment of a general meeting in certain events, but they contain no provision for postponement. It is said that the directors must be able to postpone the meeting because they may fix the time and place at which the meeting is to be held; but in my opinion that is not so. On the other hand, if the directors had power to

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KEKEWICH postpone, and a meeting adverse to the directors was called, they  
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—  
might postpone it for a week or a month, or perhaps sine die. I cannot see that there is any doubt upon the point. [His Lordship then disposed of another objection to the validity of the the meeting, and continued : —] The real question is as to the election of the directors. As to Tilden Smith, it is agreed that he was willing to stand and was re-elected. As to Foulkes, he supplied a casual vacancy caused by the retirement of a director. Under the provisions of the articles he only held office for as long as the retiring director would have held it. He therefore retired at this meeting, and he was not re-elected. Somebody else was elected instead ; so that from the date of the general meeting the board was properly constituted, the directors being Tilden Smith, Cavendish Boyle, Parker, and Blair. The officers of the company must do what the board tells them, and as long as the directors behave themselves properly the Court cannot interfere with them. There will be an order that the books, papers, and seal of the company be handed over to them.

Solicitors : *Vallance, Birkbeck & Barnard ; Birkbeck, Moreton, Thompson & Co. ; Courtenay, Croome, Son & Finch.*

H. B. H.



*In re* THOMPSON.  
THOMPSON *v.* THOMPSON.

[1906 T. 67.]\*

JOYCE J.

1906

May 11, 29.

*Will — Remoteness — Special Power of Appointment — Exercise — Rule against Perpetuities.*

A testator gave his residuary estate upon trust for his wife for life, and after her decease upon trusts for the benefit of his brother C. T. and his present and future issue as his said wife should appoint. The wife appointed the property in trust for C. T. for life, and after his death for all his children who had attained or should attain the age of twenty-five years if born in her lifetime, or twenty-one years if born after her decease. C. T. had nine children only, all of whom were born in the lifetime of the original testator, and all of whom had attained twenty-five before the death of the appointor:—

*Held*, that upon the appointment taking effect, it was certain that within the limits of perpetuity, not only would the persons to take be ascertained, but their interests would be vested, and the amount of their shares fixed; and, consequently, that the appointment was valid.

*Von Brockdorff v. Malcolm*, (1885) 30 Ch. D. 172, approved.

J. C. THOMPSON by his will dated May 14, 1872, gave all his real and his residuary personal estate to trustees upon trust for sale and conversion and to pay the income of the said residuary trust estate to his wife Mary Thompson for life, and after her death upon such trusts for the benefit of Charles Thompson and his then and future issue of whatever degree, and the testator's sister Elizabeth Insull and her then and future issue, of whatever degree, in such shares or proportions and generally in such manner within the limits of remoteness allowed by law as the said Mary Thompson should by deed, will, or codicil appoint, and in default of appointment upon certain trusts therein declared for the benefit of C. Thompson, his wife and children, and Elizabeth Insull and her children.

J. C. Thompson died on July 6, 1872.

Mary Thompson by her will dated in 1879, and a codicil dated in 1891 in exercise of the said power, appointed the property subject thereto in trust for Charles Thompson for life, and after

JOYCE J. his decease in trust "for all and every the children or child of  
 1906 the said Charles Thompson who being male have attained or  
 THOMPSON, shall attain the age of twenty-five years if born in my lifetime  
*In re.* or twenty-one years if born after my decease or being female  
 THOMPSON have attained or shall attain the age of twenty-five years if born  
*v.* in my lifetime or twenty-one years if born after my decease or  
 THOMPSON. shall being female be previously married and if more than one  
 such child in equal shares."

Mary Thompson died on February 1, 1893.

Charles Thompson died on March 17, 1905, having had nine children only, all of whom were born in the lifetime of J. C. Thompson, and all of whom were still living and had attained the age of twenty-five years before the death of Mary Thompson.

This was an originating summons taken out by the surviving trustee of the will of J. C. Thompson for the determination of the question whether the appointment contained in the will of Mary Thompson to the children of Charles Thompson was good in favour of any and which of the children of the said C. Thompson, or whether such appointment was void under the rule against perpetuities.

*Kenneth Wood*, for the plaintiff.

*Younger, K.C.*, and *G. Henderson*, for two of the sons of Charles Thompson. The question is whether, in the events which have happened and were definitely ascertained at the death of the appointor, there was any possibility of a perpetuity. At her death all the children of Charles Thompson who were living had attained twenty-five, and the only persons to whom she appointed were children living at her death who attained twenty-five, or who if born after her death should attain twenty-one. An immediate gift to the children of C. attaining twenty-five is no doubt bad; but if the facts existing at the death of the testator are regarded it may be good: *Picken v. Matthews*. (1) Here the testator has given to his wife a power of appointment which she has exercised in terms which may be bad unless the circumstances existing at her death are regarded. One of the persons to whom she appointed had attained twenty-five at

(1) (1878) 10 Ch. D. 264.

the death of the original testator, and all who were living at her death had attained twenty-five. Interpreted in the light of the existing circumstances the words which ought to be read into the will of the original testator are as follows: "In trust for Mary Thompson for life and after her death for Charles Thompson for life with remainder to the children of Charles Thompson living at my death who shall attain twenty-five and to such of them if born in the lifetime of Mary Thompson as may attain twenty-one." That would have been a perfectly good class, and the appointment is consequently valid: *Elliot v. Elliott* (1); *In re Barker* (2); *Von Brockdorff v. Malcolm* (3); *Wilkinson v. Duncan* (4); *Badham v. Mee*. (5)

*George Lawrence*, for three daughters of Charles Thompson.

*F. Cassel*, for the assigns of some of the sons of Charles Thompson, referred to *In re Coulman*. (6)

*Hughes, K.C.*, and *Dighton Pollock*, for persons entitled in default of appointment. The appointment is invalid as transgressing the limits of perpetuity. Reading the appointment into the will of J. C. Thompson, there is a gift to the children of Charles Thompson born in the lifetime of Mary Thompson who shall attain twenty-five. The class is not closed until the death of the survivor of them. The vice of remoteness affects a class as a whole if it may affect an unascertained number of its members: *Pearks v. Moseley*. (7) *Picken v. Matthews* (8) was not a case of appointment under a power. That merely turned on this, that by *Andrews v. Partington* (9), the class being closed, there could be no remoteness. In *Wilkinson v. Duncan* (4) the gift was not a class gift. Romilly M.R. draws the distinction clearly. (10) A gift which is void for remoteness cannot be made good by subsequent events.

*Younger, K.C.*, in reply, referred to *In re Hallinan's Trusts* (11); *Peard v. Kekewich* (12); Farwell on Powers, 2nd ed. p. 286.

*Cur. adv. vult.*

(1) (1841) 12 Sim. 276.

(2) (1905) 92 L. T. 831.

(3) 30 Ch. D. 172.

(4) (1861) 30 Beav. 111.

(5) (1832) 1 My. & K. 32, 55.

(6) (1885) 30 Ch. D. 186.

(7) (1880) 5 App. Cas. 714.

(8) 10 Ch. D. 264.

(9) (1791) 3 Bro. C. C. 401.

(10) 30 Beav. 115.

(11) [1904] 1 I. R. 452.

(12) (1852) 15 Beav. 166.

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JOYCE J. May 29. JOYCE J. Upon consideration this appears to me  
1906 to be a tolerably plain case and free from difficulty. The rule  
THOMPSON, against perpetuities requires that every estate or interest must  
*In re.* vest, if at all, not later than twenty-one years after the deter-  
THOMPSON mination of some life in being at the time of the creation of such  
v. estate or interest, and not only must the person to take be  
THOMPSON. ascertained, but the amount of his interest must be ascertain-  
able within the prescribed period. Or the rule may be stated  
thus: A grant or other limitation of any estate or interest to  
take effect in possession or enjoyment at a future time, and  
which is not, from the time of its creation, a vested estate or  
interest, will be void ab initio if, at the time when the limi-  
tation takes effect, there is a possibility that the estate or  
interest limited will not vest within the period of a life or lives  
then in being, or within a further period of twenty-one years  
thereafter.

In the case of a will disposing of the testator's own property or exercising a general power of appointment the rule requires that the estates or interests limited should vest, if at all, not later than twenty-one years after the termination of a life in being at the death of the testator. As to estates or interests vesting immediately upon the testator's death there is, of course, no question of remoteness. Where, as in the present case, the will under consideration is made in exercise of a special power of appointment, the question whether an estate or interest appointed by it be too remote depends upon its distance from the creation, not from the exercise, of the power. In other words, the period within which estates and interests limited by the appointment made in exercise of a special power must vest does not begin from the death of the person exercising the power, but, if such power was created by a will, from the death of the original testator. In the case of a will made in exercise of a special power of appointment,—as to any estates or interests given which vest immediately upon the testator's death, or must vest within twenty-one years afterwards,—if the testator, the donee of the power, was living at the time of its creation, there is no objection on the ground of remoteness, since what is given must vest immediately upon, or within twenty-one years after,



the termination of a life (that of the donee of the power) which was in existence at the time of the creation of the power.

In the case of a power to appoint by will to issue, however remote, if the donee of the power was alive at the time of its creation, any appointment to objects of the power specified by name or otherwise, but capable at the death of the donee of the power of being ascertained immediately, must be unobjectionable, notwithstanding that neither the appointees, nor their parents, nor their grandparents were alive at the time of the creation of the power. For the interests of the appointees vest at the appointor's death, and the appointor was living when the power was created. But if future estates or interests be given by the will of the donee of the power, the question may arise whether such estates or interests are or are not within the limits allowed by the rule, which requires them to vest not later than twenty-one years after the termination of some life in being at the time of the creation of the power.

The present case is that of an appointment by will in exercise of a special power created by the will of John C. Thompson, so that the date of the creation of the power was the death of this testator, which occurred in the year 1872. Mary Thompson, the donee of the power, was then living; consequently, as to any gift by her will exercising the power that vested immediately upon her death, no question of remoteness arises, whether such gift was to persons by name or to persons capable of being definitely ascertained at once, provided that the amount of their shares was also ascertainable within the prescribed period. Again, an appointment by her will to the children that attain twenty-one or previously marry of any person (e.g., Charles Thompson) who was living at the death of John C. Thompson, the original testator, is obviously unobjectionable.

What the testatrix did was to appoint (after a preceding life estate which vested immediately) to a composite class comprising the children of Charles Thompson born in her lifetime that attained twenty-five, or being females previously married, and the children of Charles Thompson born after her decease that

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attained twenty-one, or being females previously married. Now the children of Charles Thompson born in the lifetime of the testatrix were of course ascertained at her death. As a matter of fact, all such children had previously fulfilled the condition of attaining twenty-five: consequently each of them upon the death of the testatrix took an immediate vested interest in some share of the appointed property, the amount of which share would necessarily be determined not later than twenty-one years after the death of their father, Charles Thompson, who was living at the time of the creation of the power; for within that period all his children that lived to attain twenty-one, in particular those (if any) born after the death of the testatrix Mary Thompson, must have been of age. In point of fact, however, there were no such children born after the death of the testatrix. If the appointment made after the preceding vested life interest had been simply to the children of Charles Thompson born after the death of the testatrix who should attain twenty-one, or being female previously marry, it is plain that this would have been perfectly valid, for Charles Thompson was alive at the time of the creation of the power. Again, if the appointment after the preceding life estate had been simply to the children of Charles Thompson born in the testatrix's lifetime who attained or should attain twenty-five, then, it appearing, as the fact was, that the class of these children was closed and the members of such class definitely ascertained in her lifetime, the case would have been merely one of an immediate vested gift taking effect upon the death of the donee of the power, who was living at the time of its creation, to persons definitely ascertained. Manifestly this would have been free from all objection on the ground of remoteness. The addition to the last-mentioned class of such (if any) children of Charles Thompson as might be born after the decease of the testatrix and attain twenty-one, or being female previously marry, made no material difference with respect to the validity of the gift, since all these other children (if any) would necessarily be ascertained, as also, therefore, the amount of the share of each member of the composite class, not later than the expiration of twenty-one years from the termination of the life of Charles Thompson, their father, who was living

at the death of the original testator whose will created the power. JOYCE J.

The result is that immediately upon the appointment by will of Mary Thompson coming into force, that is to say, at her decease, it was absolutely certain that within the prescribed period of a life or lives in being at the creation of power and twenty-one years afterwards, not only would the persons to take be ascertained, but their interest would be vested and the amount or number of their aliquot shares be definitely fixed. In other words, the question asked by the summons must be answered by declaring that the appointment contained in the will and codicil of Mary Thompson in favour of the children of Charles Thompson is a good and valid appointment.

In the course of the argument before me some doubt was suggested as to the authority of the decision of Pearson J. in *Von Brockdorff v. Malcolm* (1) ; I mean, of course, that part of the decision which had reference to the question of remoteness. Professor Gray, in his most excellent treatise on the Rule against Perpetuities (2nd ed. ss. 523c and 523d), treats the decision as correct. I do not entertain the slightest doubt that it is so, and it has been followed in Ireland—*In re Hallinan's Trusts*. (2) When it is stated in Jarman on Wills (5th ed. vol. i. p. 259) that the test by which the validity of such a gift as that which I have had to consider must be tried is to read it as inserted in the deed or will creating the power in the place of the power, it is not meant that the precise language of the instrument exercising the power (in the present case the will of Mary Thompson) is to be read into the instrument creating it, viz., the will of J. C. Thompson. The will of Mary Thompson was an ambulatory document having no force or effect whatever until her death : see Gray on Perpetuities, 2nd ed. ss. 515 et seq. Inasmuch, therefore, as the appointment made by the will of Mary Thompson was so made that the persons who, according to the true construction of such will, were to take under it, and the shares they were to take would necessarily be ascertained and their interests vest not later than the expiration of twenty-one years from the death

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(1) 30 Ch. D. 172.

(2) [1904] 1 I. R. 452 ; affirmed  
 on appeal [1904] 1 I. R. 460.

JOYCE J. of Charles Thompson, who was alive at the death of the testator  
 1905 by whose will the power was created, the appointment made by  
 THOMPSON, the will of Mary Thompson was perfectly valid.  
*In re.*

THOMPSON Solicitors: *Hunter & Haynes; Walter Thompson; Williamson,*  
*v.*  
 THOMPSON. *Hill & Co.*

G. A. S.

SWINFEN  
 EADY J.

*In re* WALLIS AND GROUT'S CONTRACT.

1906

[1906 W. 1088.]

May 9, 10. *Vendor and Purchaser—Title—Recital Twenty Years old—Vendor and Pur-*  
*chaser Act, 1874 (37 & 38 Vict. c. 78), ss. 1, 2.*

A vendor's title to a freehold house comprised the following deeds:—

1. A conveyance on sale in August, 1877.

2. A first mortgage in May, 1878.

3. A second mortgage in June, 1878.

4. A release of the second mortgage in May, 1882.

5. A conveyance on sale of the house in June, 1882, by the mortgagor and first mortgagee to the vendor's immediate predecessor in title with an acknowledgment of the right to production of the prior deeds which included other property.

This conveyance recited that by the first mortgage the house and other property were "granted unto and to the use of the mortgagee his heirs and assigns" by way of mortgage "as therein mentioned."

The vendor having sold by open contract in 1906, relied on this recital and declined to furnish any title prior to the conveyance of June, 1882.

The purchaser, while insisting on her right to a forty years' title, offered to begin with the conveyance of August, 1877:—

*Held*, that the purchaser was entitled to a title beginning with the conveyance of August, 1877.

*Bolton v. London School Board*, (1878) 7 Ch. D. 766, distinguished and disapproved.

VENDOR AND PURCHASER SUMMONS.

On January 23, 1906, the vendor made an open contract to sell a freehold house to the purchaser for 260*l.*, so that *prima facie* a forty years' title was required. The abstract began with a conveyance on sale dated June 2, 1882, and made between a mortgagee of the first part, a mortgagor of the second part, and Charles Wallis, the vendor's predecessor in title, of the third part.

It recited that by an indenture dated May 9, 1878, and made



between the mortgagor of the one part and the mortgagee of the other part, "the hereditaments hereinafter described and intended to be hereby conveyed were with other hereditaments granted unto and to the use of the mortgagee his heirs and assigns for ever for the purpose of securing the repayment to the mortgagee his executors administrators or assigns of the sum of 700*l.* and interest thereon as therein mentioned." The mortgagee and mortgagor then conveyed to Charles Wallis, free of the mortgage, the mortgagor giving Charles Wallis an acknowledgment of the right to production and undertaking for safe custody of the following scheduled deeds:—

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1. A conveyance dated August 31, 1877, from Pritchett to the mortgagor.
2. The recited mortgage of May 9, 1878, from the mortgagor to the mortgagee.
3. A second mortgage dated June 24, 1878, and made between the mortgagor of the first part, Paterson and Burn of the second part, and J. Faulding, W. F. Faulding, and A. J. Faulding of the third part.
4. A release dated May 27, 1882, and made between J. Faulding, W. F. Faulding, and A. J. Faulding of the one part and the mortgagor of the other part.

The mortgagee acknowledged Charles Wallis's right to production of the recited mortgage of May 9, 1878.

Charles Wallis died on May 15, 1905, having devised the house to the vendor and appointed her his executrix. The purchaser required a forty years' title, but on the vendor stating that she was not in a position to furnish one, offered, without prejudice, to take a title beginning with the conveyance of August 31, 1877. The vendor, however, who had only succeeded in tracing the conveyance of August 31, 1877, and the second mortgage and release, but was unable to trace the first mortgage, relied on *Bolton v. London School Board* (1), and declined to furnish any title prior to the conveyance of June 2, 1882. She offered to return the deposit.

The purchaser therefore issued this summons for a declaration that she was entitled to a forty years' title.

(1) 7 Ch. D. 766.

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*Crossfield*, for the purchaser. *Bolton v. London School Board* (1) is distinguishable. The recital of the mortgage of May 9, 1878, states that the property was granted to the mortgagee to secure the repayment of the 700*l.* and interest "as therein mentioned." Those words entitle the purchaser to a proper abstract of the mortgage in order to ascertain to what they refer.

Secondly, assuming that the recital is within *Bolton v. London School Board* (1), it does not bar the purchaser's right to the title between the recited mortgage of May 9, 1878, and the conveyance of June 2, 1882. The vendor must clearly abstract the intermediate second mortgage and the release. These abstracts must, of course, be at the vendor's expense: *In re Johnson and Tustin*. (2)

Thirdly, *Bolton v. London School Board* (1) has been questioned by every text-writer of repute: see, for instance, Wolstenholme's Conveyancing Acts, 9th ed. p. 10; Hood & Challis' Conveyancing Acts, 6th ed. p. 2; Davidson's Conveyancing Precedents, 5th ed. vol. i. p. 110; Key & Elphinstone's Conveyancing Precedents, 8th ed. vol. i. pp. 238, 382; Prideaux's Conveyancing Precedents, 19th ed. vol. i. p. 115; Bythewood & Jarman's Conveyancing Precedents, 4th ed. vol. ii. p. 677; Gover on Title, 4th ed. p. 6; Webster on Conditions of Sale, 2nd ed. p. 237; Farrer on Conditions of Sale, p. 229; Dart on Vendors and Purchasers, 7th ed. vol. i. p. 162; and Williams on Vendors and Purchasers, vol. i. p. 109, n. The vendor is therefore strictly entitled to a forty years' title, but she is still willing to begin with the conveyance of August 31, 1877.

*J. G. Wood*, for the vendor. The vendor has not a forty years' title. She cannot compel the purchaser to accept less: *In re Marsh and Earl Granville* (3); but she cannot produce what she has not got. The recited mortgage of May 9, 1878, is missing, so the vendor cannot even make a title beginning with the conveyance of August 31, 1877. She is therefore obliged to rely on the recital. Now that recital is a clear recital that the fee passed by the mortgage. The words "as therein mentioned" referring to the interest or terms of repayment are immaterial, as the

(1) 7 Ch. D. 766.

(2) (1885) 30 Ch. D. 42.

(3) (1883) 24 Ch. D. 11.

mortgagee and mortgagor both conveyed to Charles Wallis, the vendor's predecessor. The recital therefore proves that the fee passed on May 9, 1878, and bars the purchaser's right to an abstract of the mortgage or the conveyance of August 31, 1877, or any prior title: *Bolton v. London School Board*. (1) In spite of the adverse comments of the text-writers, that case has stood for nearly thirty years without judicial comment. The vendor was possibly wrong in not abstracting the title subsequent to the recital, viz., the second mortgage and the release; but she ought not to be ordered to abstract the mortgage of May 9, 1878, and still less the prior conveyance of August 31, 1877.

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SWINFEN EADY J. (after stating the facts). The vendor relies on the recital in the conveyance of June 2, 1882, and contends, on the authority of *Bolton v. London School Board* (1), that she is not bound to furnish any title prior to that conveyance. Now in that case the abstract began with a conveyance of November 25, 1853, by which the fee simple was conveyed by Walker to Thomas Bolton, who devised it to the plaintiffs in trust for sale. The conveyance, which was more than twenty years old, contained a recital that Walker was seised in fee simple, and the title was properly traced from Walker. Malins V.-C. held that the recital, except so far as proved inaccurate, was sufficient evidence that Walker was seised in fee simple and that no prior title could be required.

The circumstances of the present case are entirely different. The conveyance of June 2, 1882, which recites the mortgage of May 9, 1878, refers to a subsequent mortgage of June 24, 1878, and a release of May 27, 1882. Why is the purchaser not entitled to investigate those deeds? On what ground can it be contended that no title prior to June 2, 1882, need be shewn? *Bolton v. London School Board* (1) does not cover the point, as even assuming that the property passed by the mortgage of May 9, 1878, the title from then down to the conveyance of June 2, 1882, is not deduced at all. This is quite different from a recital that a former owner was seised in fee simple and a subsequent deduction of title from him.

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Even if the case fell within *Bolton v. London School Board* (1) I should feel grave difficulty in following that decision. The Court is bound by the Vendor and Purchaser Act, 1874, a recent statute, the language of which is reasonably plain. Sect. 1 provides that in the completion of any contract of sale of land made after December 31, 1874, and subject to any stipulation to the contrary in the contract, forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the present period of such commencement. Sect. 2 provides that in the completion of any such contract as aforesaid, and subject to any stipulation to the contrary in the contract, the obligations and rights of vendor and purchaser shall be regulated by the following rules. The second rule is that recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions.

I can see nothing in s. 2 to relieve the vendor from the duty of abstracting the title prior to the twenty years old deed, or to relieve her from the obligation of furnishing a forty years' title under s. 1.

Bolton v. London School Board (1) seems to have been adversely commented on by every text-writer of repute, and in the very careful and excellent treatise recently published by Mr. Cyprian Williams on Vendors and Purchasers the author submits that the decision is clearly wrong for the reasons given in the note at p. 109.

In my opinion those reasons are well founded, and if it had been necessary I should have held that I was bound by the language of the statute, and I should have decided that notwithstanding the recital in the deed of June 2, 1882, the vendor was bound to furnish a forty years' title. But as I have already pointed out, *Bolton v. London School Board* (1) does not cover the present case. [After referring to the correspondence and the purchaser's offer to accept a shorter title, his Lordship

(1) 7 Ch. D. 766.

continued :—] As the purchaser has offered to accept a title beginning with the conveyance of August 31, 1877, I declare that she is entitled to an abstract beginning with that deed.

Solicitors : *William Morgan Lloyd ; Pettitt & Valentine.*

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[1905 D. 937.]

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May 10.

Tenant for Life and Remainderman—Residuary Personality—Testator's Liabilities—Covenant to pay Life Annuities—Capital and Income—Apportionment.

A testator who had covenanted to pay life annuities bequeathed the proceeds of sale of his residuary real and personal estate upon successive trusts for a life tenant and remainderman :—

Held, that the successive instalments of the annuities must be borne by income and capital in proportion to the actuarial values of the life estate and reversion at the testator's death.

Yates v. Yates, (1860) 28 Beav. 637, followed.

In re Bacon, (1893) 62 L. J. (Ch.) 445, not followed.

ORIGINATING SUMMONS.

By his will dated August 5, 1897, a testator devised and bequeathed his residuary real and personal estate to his executors and trustees upon trust for sale and conversion, and directed them to hold the proceeds upon successive trusts for a life tenant and an infant remainderman.

The testator died on February 11, 1903.

He had covenanted to pay a life annuity of 65*l.* to one annuitant, and after his death a reversionary life annuity of 20*l.* to a second annuitant if he survived the first annuitant. The annuities were payable half-yearly. The estate, after clearing debts and legacies other than the annuity debt, was 3900*l.*, of which 2100*l.* was invested on mortgage at 4 per cent. and 800*l.* in consols.

The annuitants were both living.

This summons was issued to determine how their successive annuities were to be borne as between capital and income.

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Walters Horne, for the executors and trustees.

Dighton Pollock, for the life tenant. The annuities are debts, and must therefore be paid out of capital. This can be done by capitalizing them ab initio, or by paying each instalment out of capital, or by paying it out of income and giving the life tenant a charge. In each case the life tenant loses or bears the future interest automatically. The principle is that each instalment, being contingent on the annuitant being alive, is residue until it is wanted, so that until then the life tenant is entitled to interest. This is the result of the considered judgment of Kekewich J. in *In re Bacon* (1), following *Allhusen v. Whittell* (2), *In re Muffett* (3), and *In re Harrison*. (4) Possibly the life tenant ought to be charged one year's interest, or rather discount, on each instalment according to the rule in *Allhusen v. Whittell* (2), but otherwise the above principle applies.

Bryan Farrer, for the remainderman. The life tenant is only entitled to the income of true residue, that is, the residue left after the liabilities are paid or provided for: *Fletcher v. Stevenson*. (5) The instalments of the annuities are debts, and cannot be treated as contingent so as to be residue until they are wanted. That rule is confined to contingent legacies: *In re Whitehead*. (6) Suppose the estate were 1000*l.* invested at 4 per cent. and the annuity 40*l.* a year. If the life tenant and annuitant both lived twenty-five years they would exhaust the estate, the life tenant's income gradually diminishing from 40*l.* to zero, and the remainderman getting nothing. This method obviously gives the life tenant more than the income of true residue, and is therefore fallacious. It is not capitalization at all.

If the duration of the annuity were certain, its present value could be at once charged to capital at the testator's death. The same result will be obtained and the uncertainty avoided by charging the present value of each instalment retrospectively when it accrues. Capital will of course bear less and income more of each successive instalment. This is the obvious extension

(1) 62 L. J. (Ch.) 445.

(2) (1867) L. R. 4 Eq. 295, 303.

(3) (1888) 39 Ch. D. 534, 537.

(4) (1889) 43 Ch. D. 55, 61.

(5) (1844) 3 Hare, 360, 371.

(6) [1894] 1 Ch. 678, 684.

of the rule in *Allhusen v. Whittell* (1) and *Lambert v. Lambert* (2), where apparently a debt is considered as payable at the end of the executor's year, and the present value at the testator's death is charged to capital, the calculation being made at the rate of interest or income actually earned. The order in *Allhusen v. Whittell* (1) is given in Seton on Judgments, 6th ed. p. 1679.

The present question did not arise in *In re Muffett* (3) or *In re Harrison* (4), as those were cases of specific devises to which the true residue rule of *Allhusen v. Whittell* (1) was inapplicable. The distinction was clearly pointed out by North J. in *In re Harrison* (4), but it was apparently lost sight of in *In re Bacon* (5), which is the only case in favour of the life tenant's contention. The above rule is strict and logical, and it is the only rule that is certain to do absolute justice between life tenant and remainderman. It is, however, troublesome to trustees, and a rough and ready plan was suggested in *Yates v. Yates* (6) to avoid the difficulty. The life estate and reversion are valued once for all at the testator's death, and the instalments of the annuity apportioned in this fixed proportion. This plan, though somewhat speculative, has the great merit of simplicity and convenience, and might well be adopted in the present case.

Dighton Pollock, in reply. The case is really covered by *In re Bacon* (5), which lays down a most convenient rule. The rule in *Allhusen v. Whittell* (1), though perhaps more logical, is very inconvenient in practice. The speculative method of *Yates v. Yates* (6) is not founded on any strict principle, and can only be adopted by arrangement, to which the life tenant does not assent.

[SWINFEN EADY J. The case was followed by Chitty J. in *In re Muffett*. (3)]

It was only followed so far as it shewed that the annuity was a debt. The method was not followed. The head-note is wrong.

SWINFEN EADY J. The question is how the successive payments of the annuities are to be apportioned as between life

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(1) L. R. 4 Eq. 295, 303.

(2) (1873) L. R. 16 Eq. 320.

(3) 39 Ch. D. 534, 537.

(4) 43 Ch. D. 55, 61.

(5) 62 L. J. (Ch.) 445.

(6) 28 Beav. 637.

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tenant and remainderman. It is not disputed that the life tenant is only a life tenant of the clear residue after the testator's obligations are satisfied. The covenants to pay the annuities are obligations, and although the first annuity is for an uncertain period and the second is for an uncertain period and contingent, the liability under the covenants is a liability for which provision must be made before the clear residue can be ascertained.

In Fletcher v. Stevenson (1) Wigram V.-C. said: "The tenant for life is entitled to the income only of the true residue of the testator's estate. If the demands to which the estate of the testator may possibly be found liable (annually as well as occasionally) were certain though future, I am not prepared to say, that the present value of all those liabilities must not be ascertained in order to shew what the true residue of the testator's estate is, upon the same principle upon which the Court in favour of a tenant for life reduces future assets into possession at their present value. I cannot say, that, in favour of the remainderman, the Court ought not to reduce the future liabilities of the estate into present value, in order to ascertain the true residue of the estate, which the tenant for life and the remainderman are to enjoy in succession. And, if that be so where the liabilities are certain, the Court must equally do so, until the result is known, where, as in this case, no security can be given, and the funds are an inadequate security for the possible demands of the covenantee. It is only with the true residue I can deal, as between the tenant for life and remainderman."

The ordinary rule is the rule of *Allhusen v. Whittell*. (2) It is not disputed that it applies, but it is urged that its application to periodical payments is expensive, inconvenient, and difficult.

The rule has, in fact, been applied in different ways. In *Yates v. Yates* (3) Romilly M.R. said: "I am of opinion that the past and growing payments of the annuity should be apportioned between the value of the life estate and the value of the reversion, whatever that may be. It must be treated in exactly

(1) 3 Hare, 360, 371.

(2) L. R. 4 Eq. 295, 303.

(3) 28 Beav. 642.

the same manner as if this lady were a creditor, which was the contention of Mr. Selwyn, and I decide that point in his favour. If she were a stranger, it is quite clear that the life interest ought not alone to pay the stranger's debt; and the growing payments of the annuity are nothing more than a succession of specialty debts, becoming due from year after year as long as the annuity lasts, and each of those debts must be apportioned between the tenant for life and the reversioner. If the parties think fit to agree between themselves what the value is, and to apportion it, it may be done by arrangement; but if not, each payment must be apportioned between the value of the life estate and the value of the reversion."

In *In re Muffett* (1) Chitty J. purported to follow *Yates v. Yates* (2), *Bulwer v. Astley* (3), and *Yonge v. Furze*. (4) He said: "I hold that the principle of the three cases referred to applies to the present case, and that the 180*l.* annuity is to be treated as if capitalized and paid out of the corpus of the estate, and that any payments made since the date of the testator's death, and any future payments of the annuity must upon the footing of this decision be adjusted between the tenants for life and remaindermen."

The question is whether in applying the rule of *Allhusen v. Whittell* (5) it is better to deal with the matter on the footing of a fixed apportionment or whether there should be a separate calculation for each half-yearly instalment, taking the period from the testator's death to the day of payment. This would be a most inconvenient course in practice. The necessary calculations would be beyond the capacity of ordinary trustees, and would involve the employment of professional assistance, and cause substantial expense. On the other hand, if the values of the life estate and reversion are ascertained once for all, as in *Yates v. Yates* (2), and the instalments of the annuity divided in that fixed proportion, the expense will be less, and the result practically the same. I therefore follow the rule in *Yates v. Yates* (2), and direct the successive payments to be apportioned

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(1) 39 Ch. D. 534, 537.

(3) (1844) 1 Ph. 422.

(2) 28 Beav. 637.

(4) (1855) 20 Beav. 380.

(5) L. R. 4 Eq. 295, 303.

SWINFEN in proportion to the values of the life estate and reversion at
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May 10.

In re PERTH ELECTRIC TRAMWAYS, LIMITED.
LYONS *v.* TRAMWAYS SYNDICATE, LIMITED AND
PERTH ELECTRIC TRAMWAYS, LIMITED.

[1906 P. 499.]

Company—Debentures—Issue—Deposit of Blank Debenture to Secure Loan.

A company had power to issue a series of mortgage debentures of 100*l.* each. Each debenture was to be under seal in a certain form, and was to be issued to a holder specified therein and registered. The company had no power to reissue debentures:—

Held, that the deposit of an unregistered 100*l.* debenture, sealed in blank without name or date, to secure a temporary loan, was an issue of that debenture, so that it could not be reissued after repayment of the loan.

Levy v. Abercorris Slate and Slab Co., (1887) 37 Ch. D. 260, 264; *In re Strand Music Hall Co.*, (1865) 3 D. J. & S. 147; *In re Regent's Canal Ironworks Co.*, (1876) 3 Ch. D. 43; *In re George Routledge & Sons, Ltd.*, [1904] 2 Ch. 474, 480; and *In re W. Tasker & Sons, Ltd.*, [1905] 2 Ch. 587, 598, applied.

SPECIAL CASE.

The Perth Electric Tramways, Limited, hereinafter called the company, was incorporated under the Companies Acts, 1862 to 1893, with a memorandum and articles dated January 27, 1898.

By a trust deed, dated December 30, 1903, and made between the company of the one part and trustees of the other part, the company assigned its assets and property to the trustees (subject to prior trust deeds for securing 200,000*l.* debenture stock) upon certain trusts for securing 500 debentures of 100*l.* each. Each debenture was to be under seal and in the form in the schedule, and was to be issued to a person specified therein as a creditor for 100*l.*

This form contained the following covenant:—

“The Perth Electric Tramways, Limited (hereinafter called the

company), hereby acknowledges that it is indebted to of
in the sum of 100*l.* and hereby covenants to pay to the
said or other the registered holder for the time being
hereof the principal sum of 100*l.* on December 31, 1931. . . .”
A register of debentures was to be kept by the company, in
which were to be entered the names, addresses and descriptions
of the registered holders. The debentures were defined as “the
debentures of the company for the time being outstanding and
entitled to the benefit of these presents,” and the debenture
holders as “the holders for the time being of the debentures.”
Each debenture was subject to redemption on three months’
notice at 2½ per cent. premium. The company was to provide a
sinking fund for redemption by drawings at par or by purchase
below par, and debentures so repaid, whether by purchase or
drawings, were to be cancelled and not re-issued.

On January 7, 1904, the trust deed was registered at Somerset
House, under the Companies Act, 1900 (63 & 64 Vict. c. 48),
s. 14.

In June, 1905, the company arranged to borrow 2000*l.* from
its bank, upon the security of a deposit of twenty-one deben-
tures, and at a board meeting of June 22, 1905, it was resolved
that a loan of 2000*l.* be obtained from the company’s bank,
the Union Bank of Scotland, Limited, on the security of twenty-
one debentures, which the directors were authorized to sign and
seal.

The twenty-one debentures, numbered 361 to 381, were
accordingly signed and sealed at a board meeting of June 28,
1905.

By arrangement with the bank they were signed and sealed
in blank, i.e., without the holder’s name or the date. They were
not registered in the debenture register or at Somerset House.
They were simply deposited with the bank as security for the
loan.

On August 30, 1905, the company repaid the loan, and
received back the twenty-one blank debentures.

In September, 1905, the company issued six of these deben-
tures, numbered 361 to 366, for value to the Tramways Syndi-
cate, Limited, filling in the name of the syndicate and the date,

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but without re-sealing the debentures. The syndicate was duly registered as holder thereof, and the debentures were registered at Somerset House.

The syndicate had no reason to suppose that there had been any prior dealing with these six debentures. The other fifteen blank debentures remained in the hands of the company, who proposed to issue them. Several other debentures had been regularly issued, one of which was held by the plaintiff as registered holder.

The questions were—

1. Whether the twenty-one debentures were issued and discharged by the transactions with the bank.
2. Whether the syndicate's six debentures were invalid, and ought to be delivered up to be cancelled.
3. Whether the company ought to be restrained from issuing the remaining fifteen debentures.
4. What were the plaintiff's rights in the matter.
5. How the costs should be dealt with.

The syndicate joined in the special case, but did not appear at the hearing.

Gore-Browne, K.C., and *Sargant*, for the plaintiff. The deposit of the twenty-one blank debentures with the bank as security for the loan amounted to an agreement to complete, re-seal and issue them formally when called on, and gave the bank an equitable charge equivalent to actual debentures: *In re Strand Music Hall Co.* (1); *In re Queensland Land and Coal Co.* (2) That constituted an issue. Issue is not a technical but a mercantile term, meaning "delivery over by the company to the person who has the charge": *Levy v. Abercorris Slate and Slab Co.* (3) When the loan was paid off and the debentures were returned to the company, their force was spent, and they could not be re-issued: *In re George Routledge & Sons, Ltd.* (4); *In re W. Tasker & Sons, Ltd.* (5)

Percy Wheeler, for the company. The blank debentures were

(1) 3 D. J. & S. 147.

(3) 37 Ch. D. 260, 264.

(2) [1894] 3 Ch. 181.

(4) [1904] 2 Ch. 474, 480.

(5) [1905] 2 Ch. 587, 598.

in themselves wholly void: *Hibblewhite v. M'Morine* (1); *Société Générale de Paris v. Walker* (2); but I admit that the deposit constituted an agreement to issue them in proper form, if asked for, and that the bank had an equitable charge. An agreement to issue does not constitute an issue in a legal or technical sense, still less in a mercantile sense. It merely gives a right to call for an issue. The bank had a right to call for a valid issue, but they never exercised it. They could not have transferred the debentures until they had been completed and registered in the name of the bank.

An agreement is not the same thing as a completed transaction. For instance, the deposit of a lease as security for a loan, with an agreement to give a legal mortgage, or an agreement to assign it for value, is no breach of a covenant not to assign, although the mortgagee or purchaser has an equitable right to specific performance.

To hold that a mere deposit of blank debentures to secure a temporary loan constitutes an issue would be a most dangerous extension of *In re W. Tasker & Sons, Ltd.* (3), and would be highly conducive to fraud.

SWINFEN EADY J. The facts are fully set out in the special case. No separate point is raised with regard to the six debentures held by the syndicate. The real question is whether the company has power to issue the twenty-one debentures at the present time. The company claims that these debentures were never issued to the bank, that the first issue was the issue of the six to the syndicate, that the other fifteen have never been issued, and can therefore now be issued.

The short point is whether the transaction with the bank amounted to an issue within the meaning of the trust deed, so that the twenty-one debentures in question are spent and cannot be re-issued.

In *Levy v. Abercorris Slate and Slab Co.* (4) Chitty J. pointed out that the word "issue" is not a technical but a mercantile term. The question is, therefore, whether the debentures have been

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(1) (1840) 6 M. & W. 200.

(2) (1885) 11 App. Cas. 20.

(3) [1905] 2 Ch. 587, 598.

(4) 37 Ch. D. 260, 264.

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TRAMWAYS
SYNDICATE,
LIMITED
AND PERTH
ELECTRIC
TRAMWAYS,
LIMITED.

issued in the mercantile sense of the term. Now what was the bank's position? There was a resolution to borrow 2000*l.* from the bank on the security of twenty-one debentures, and then there was a board meeting, at which the twenty-one debentures in question were signed and sealed in accordance with the previous resolution of the board. They were left in blank as regards name and date, and the twenty-one sealed documents or pieces of paper were deposited with the bank by way of security. It is clear that that transaction gave the bank an equitable charge. There was an agreement that the bank advancing the 2000*l.* should have the security of twenty-one debentures, and in equity the bank had that charge on twenty-one debentures.

If the bank had not been repaid, and if the company had gone into liquidation, the bank would have been entitled to prove and receive dividends on the full nominal amount of the debentures. They had a valid equitable agreement to give them those debentures. The language of Stirling L.J. in *In re W. Tasker & Sons, Ltd.* (1), as to Ashby and Herbert's position is equally applicable to the bank's position. Mutatis mutandis the passage would run, "It was not disputed that if no repayment had been made to" the bank, "and the debentures had remained in their hands, they would have been entitled to prove in the" liquidation "and to receive dividends on the full nominal amount of the debentures in their hands *pari passu* with the other debenture-holders until they received in full the principal and interest due to them. This right was established by the Court of Appeal in *In re Regent's Canal Ironworks Co.* (2) It was there decided that a company may issue or deposit debentures by way of collateral security for money lent, and that the holders of other debentures of the same issue have no equity to prevent such a bargain from being carried into effect."

If they may so deposit debentures validly issued, they may equally agree to do so, and full effect will be given to such an agreement: *In re Strand Music Hall Co.* (3) In *In re George Routledge & Sons, Ltd.* (4), Buckley J. says: "I agree that if there is a contract that a person is to have a loan on the

(1) [1905] 2 Ch. 587, 598.

(2) 3 Ch. D. 43.

(3) 3 D. J. & S. 147.

(4) [1904] 2 Ch. 474, 480.

terms that the lender is to have a binding security, and he does not get that which he contracted to have, he has the right to be placed in the same position as if he had got it." In the present case, there was a contract to give the bank debentures. Equity considers that as done which ought to be done. The bank had a valid contract for these particular debentures which the company agreed to issue to them, and could not issue to anyone else. The debentures have served their purpose. They have been used as security for the loan, albeit a temporary loan, and the loan has run its course and been paid off.

Under those circumstances I am of opinion that the debentures in question were issued or agreed to be issued, and that as the company has no power according to the trust deed, under which the debentures were created, to re-issue debentures, it is not now in a position to deal with the twenty-one debentures. It cannot re-issue the fifteen under its control, and the six already issued to the syndicate have not been validly issued. In my opinion this result follows from the decisions of *In re Strand Music Hall Co.* (1), *In re Regent's Canal Ironworks Co.* (2), *In re George Routledge & Sons, Ltd.* (3), and *In re W. Tasker & Sons, Ltd.* (4)

I therefore answer the first three questions in the affirmative and declare that the plaintiff has a right to prevent the company from re-issuing or purporting to re-issue these debentures. In default of agreement the company must pay the plaintiff's costs.

Solicitors: *Burn & Berridge: Hugh Charles Godfray.*

(1) 3 D. J. & S. 147.

(2) 3 Ch. D. 43.

(3) [1904] 2 Ch. 474, 480.

(4) [1905] 2 Ch. 587, 598.

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ELECTRIC
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LIMITED,
In re.

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v.

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SYNDICATE,
LIMITED
AND PERTH
ELECTRIC
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1906

April 25;
May 9, 17.

In re BLUNDELL.
BLUNDELL v. BLUNDELL.

[1906 B. 872.]

Will — Satisfaction — Daughter's Settlement — Father's Covenant — Absolute bequest to Daughter — After-acquired Property Clause — Persons derivatively entitled — Election.

By a marriage settlement of 1898 a sum of 10,000*l.* (which included a sum of 5539*l.* secured to the trustees by the covenant of the wife's father) was settled on certain trusts for the wife, husband and children, the wife taking the first life interest, and covenanting to settle after-acquired property, to which she became entitled during the coverture, on substantially the same trusts.

By his will of 1905 the father gave one-third of his residuary real and personal estate to the wife for her separate use absolutely. The father died during the coverture. His clear residuary estate, subject only to the covenant, was 80,000*l.*, all personalty:—

Held, that the bequest was a satisfaction as to the wife's life interest in the 5539*l.* secured by the covenant, but not as to the interests of other cestuis que trust not mentioned in the will, taking no direct interest in the bequest, and only in fact taking derivatively under the after-acquired property clause, because the bequest happened to take effect during the coverture. The wife was therefore the only person put to election.

Lord Chichester v. Coventry, (1867) L. R. 2 H. L. 71, 92, 95, applied.

ORIGINATING SUMMONS.

By a marriage settlement dated July 11, 1898, and made between the husband of the first part, the wife of the second part, the husband's father of the third part, the wife's father of the fourth part, and trustees of the fifth part, a sum of 4092*l.* consolidated stock of the Lancashire and Yorkshire Railway Company, transferred to the trustees by the wife's father, and thereafter called the wife's fortune, was settled upon trust for the wife for life for her separate use without power of anticipation, and after her death upon trust as to one moiety for the husband, if surviving, for life, and as to the other moiety upon trust for the husband, if surviving, during widowhood so long as any issue of the marriage were living, and [subject thereto in trust

for the children or remoter issue of the marriage as the husband and wife should by deed jointly appoint; or as the survivor should by deed or will appoint; and in default of appointment, in trust for the children of the marriage who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry, in equal shares; and in default of such children, and subject to the preceding trusts, in trust for the wife's father, subject to a power enabling the wife to make a resettlement on a subsequent marriage.

The wife's father covenanted to pay the trustees during the lives of himself and his wife and the survivor of them, by equal half-yearly payments, a yearly sum sufficient to make up the income of the wife's fortune to 200*l.* a year, and on the death of the survivor to pay them a capital sum sufficient to make up the capital value of the wife's fortune at that date to 10,000*l.*

The yearly and capital sums covenanted to be paid were to be applied and held on the trusts of the income and capital of the wife's fortune.

The settlement contained the usual covenant to settle after-acquired property to which the wife should become seised, possessed of or entitled in possession, reversion, remainder, contingency or expectancy "during the said intended coverture," unless expressly exempted by the instrument under which it was acquired. The after-acquired property was to be settled upon the trusts of the wife's fortune, except that the ultimate trusts in default of children who being sons attained twenty-one, or being daughters attained that age or married, were, subject to the wife's and husband's life interests, for such persons as the wife should, while discoverd by deed or, whether covert or discoverd, by will appoint, and in default of appointment for the wife if she survived the husband, or her statutory next-of-kin if she predeceased him.

In the first half of 1904 the wife's father advanced her 1700*l.* for carrying out certain alterations in her residence and 1300*l.* for furnishing, i.e., in all 3,000*l.*, and in January, 1905, he advanced his son Cuthbert 500*l.* when he was farming in South Africa.

By his will dated May 15, 1905, the wife's father, after

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—

appointing the applicants his executors and trustees, and after making a specific bequest and a specific devise, devised and bequeathed his residuary real and personal estate to his son Cuthbert and his daughters Muriel (the wife) and Ethel absolutely in equal shares as tenants in common, and declared that the share of each such daughter should be for her sole and separate use and enjoyment, and free from the debts or control of her present or any future husband. The will proceeded, "And I declare that the sum of 3000*l.* advanced to my said daughter Muriel and the sum of 500*l.* advanced to my said son Cuthbert must be brought by them into hotchpot before they can receive any portion of the residue of my estate." There was no direction to pay debts.

The testator died on November 1, 1905, his wife having predeceased him. The amount required to make up the wife's fortune to 10,000*l.* under the testator's covenant was 5539*l.* The clear residuary estate, subject only to this liability, was 80,000*l.*, and was all personalty.

This summons was issued to determine to what extent (if any) the gift of the share of residue was a satisfaction of the covenant.

*R. J. Parker*, for the executors and trustees of the will.

*Christopher James*, for Cuthbert, who was also a settlement trustee. The testator obviously knew of the after-acquired property clause, and could have exempted Muriel's share of residue. As he has not done so, he must be taken to have made the bequest in reliance on that clause, the trusts of which, quoad wife, husband, and children, are substantially the same as those of the wife's fortune. They are therefore put to their election: *Weall v. Rice* (1); *Thynne v. Earl of Glengall*. (2) On this point the ultimate trusts are immaterial. In the actual circumstances, however, one-third of the settled 10,000*l.* (including the 5539*l.*) comes back into settlement on the ultimate trusts of the after-acquired property clause. The direction to bring the 3000*l.* and 500*l.* into hotchpot was necessary, because the double portions rule only applies to portions, and not to mere gifts like these:

(1). (1831) 2 Russ. & My. 251

(2) (1848) 2 H. L. C. 131.

*In re Scott*. (1) The hotchpot clause cannot, therefore, be relied on as “expressio unius exclusio alterius”: *Earl of Durham v. Wharton* (2); *Lord Chichester v. Coventry*. (3) There is at all events a satisfaction as to the wife’s life interest: *McCarogher v. Whieldon*. (4)

*Martelli*, for the wife and the other settlement trustee. The only question is whether the testator supposed himself to be substantially satisfying his covenant: *Lord Chichester v. Coventry*. (3) He covenanted to pay 5539*l.* to the trustees upon successive trusts for the wife, husband, children, and himself. An absolute bequest to the wife for her separate use cannot have been intended to satisfy this covenant. The after-acquired property clause is merely an assignment by the wife, and ought not to be considered. The form of the bequest, with the declaration as to separate use, shews that the testator was not considering it. Even if he was, the trusts of the after-acquired property are substantially different from those of the wife’s property. The bequest cannot, therefore, have been intended as a satisfaction: *Lord Chichester v. Coventry* (3); *In re Tussaud’s Estate*. (5) The limitations, and not the actual results of the bequest, are the test of intention. The 3000*l.* and 500*l.* were clearly portions, and the hotchpot clause implies that no other portion is to be brought into account.

*Jessel*, for the children. The absolute bequest to the wife happens to be caught by the after-acquired property clause, because the husband and wife both survived the testator, so that it came into operation during the coverture. Otherwise the children would have had no interest, and there could have been no question of satisfaction as far as they were concerned: *McCarogher v. Whieldon*. (4)

On a certain contingency the children took as assignees. But the testator cannot have intended an absolute bequest to the contingent assignor as a contingent satisfaction of the interests of contingent assignees, whom he does not mention, who take nothing directly under the will, and who are only derivatively

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(1) [1903] 1 Ch. 1, 9.

(3) L. R. 2 H. L. 71, 91.

(2) (1836) 3 Cl. & F. 146, 156.

(4) (1867) L. R. 3 Eq. 236, 243.

(5) (1878) 9 Ch. D. 363.

SWINFEN EADY'J. entitled in the events that have happened : *Bellasis v. Uthwatt*. (1)  
 1906 No case of satisfaction goes as far as that. The hotchpot clause  
 shows a contrary intention.

BLUNDELL, *Christopher James*, in reply. The children were entitled to the  
*In re.* 5539*l.* The testator ignored their claim and included the amount  
 BLUNDELL in his residue. Immediately on his death the children became  
*v.* derivatively entitled to a share of this residue. The other  
 BLUNDELL residuary legatees can therefore put them to election : *Cooper v.*  
*Cooper*. (2)

*Cur. adv. vult.*

May 17. SWINFEN EADY J. The question raised by this summons is whether the devise and bequest of one-third share of the testator's residuary real and personal estate to his daughter Muriel operated to any and what extent as a satisfaction of the testator's covenant in his daughter's marriage settlement.

No question was raised as to the railway stock comprised in the settlement. The argument before me was limited to the moneys payable in satisfaction of the covenant, namely, a sum of 5539*l.* The residue of the testator's estate (after paying all debts and expenses other than this liability) is estimated at 80,000*l.*, and one-third of this residue is given by the will to the testator's daughter Muriel for her separate use, with a direction to bring 3000*l.*, therein mentioned, into hotchpot.

The interest taken by Muriel under her father's will is (in the events that have happened) bound by the covenant for the settlement of after-acquired property contained in her settlement. She takes the first life interest under the settlement, in 10,000*l.* (which includes the 5539*l.* in question), and also in her after-acquired property.

The first question, therefore, is whether the bequest to Muriel of a share of residue is a satisfaction of the testator's liability under his covenant so far as regards her life interest in the 5539*l.* covenanted to be paid to the trustees of her marriage settlement. Equity leans against double portions, and the general rule is that wherever a legacy given by a parent, or a person standing in loco parentis, is as great as or greater than a

(1) (1737) 1 Atk. 426, 428. (2) (1874) L. R. 7 H. L. 53, 71, 76, 79.



portion previously secured to the legatee upon marriage or otherwise, a presumption arises that the legacy was intended as a satisfaction of the portion. If the legacy is less than the portion a presumption arises that it was intended as a satisfaction pro tanto. And a share of residue is on the same footing as a pecuniary legacy as regards the rule against double portions: *Thynne v. Earl of Glengall*. (1) It is also true that where there is a covenant with trustees to pay a sum to them to be held in trust for persons in succession a legacy given to one or more of the cestuis que trust may operate as a satisfaction of the covenant so far as the legatees are concerned, without satisfying the covenant so far as the other cestuis que trust are concerned, who are not legatees. Thus in *Lord Chichester v. Coventry* (2) Lord Romilly says: "In cases of satisfaction, where the testator has first entered into a covenant to settle a sum of money upon his child for life, with remainder to the issue of the marriage, that covenant is not satisfied by a bequest of a like sum of money to that child absolutely; it is only satisfied pro tanto, that is, so far as the child is concerned." And later on he says: "I am of opinion that as a covenant may be satisfied pro tanto, as is laid down in *Kirk v. Eddowes* (3) and several other cases, so also the converse of that proposition is true, namely, that a provision by will may satisfy one part of the covenant without satisfying the other parts of it; for instance, that if a father, on the marriage of his daughter, should settle 10,000*l.* on her for life, remainder to the children of the marriage, a bequest of 10,000*l.* to that daughter would satisfy her life interest in the 10,000*l.*, but would not satisfy or touch the interests of her children." The difference between the provisions in a settlement and will as regards persons entitled in remainder may be sufficient to rebut the presumption against double portions with regard to them; but the mere fact that in a settlement a person takes for life, and under a will the same person takes absolutely, will not prevent the application of the rule so far only as regards the life interest taken by that person under the settlement.

Reliance was placed on behalf of Muriel upon the following

(1) 2 H. L. C. 131.

(2) L. R. 2 H. L. 71, 92, 95.

(3) (1844) 3 Hare, 509.

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provision in the testator's will: "And I declare that the sum of 3000*l.* advanced to my said daughter Muriel and the sum of 500*l.* advanced to my said son Cuthbert must be brought by them into hotchpot before they can receive any portion of the residue of my estate." It appears from the evidence that the 3000*l.* was advanced between January and June, 1904, for the purpose as to 1700*l.* of carrying out certain alterations in Muriel's residence, and as to 1300*l.* for furnishing the residence, and that the 500*l.* was advanced to the testator's son Cuthbert, in January, 1905, when he was farming in South Africa. It was urged that this clause negatives the idea of satisfaction of any part of her marriage portion; that the testator would have mentioned this if he had intended satisfaction of it. The answer to this argument is that given by Lord Lyndhurst in *Earl of Durham v. Wharton* (1), when a similar argument was addressed to him. The advances of 3000*l.* and 500*l.* being before the date of the will, it was necessary to mention them, if they were to be brought into account on the division of the testator's estate; but so far as related to the marriage portion secured by the covenant in the settlement, it was not necessary, because that effect is produced by operation of law.

Under these circumstances I am of opinion that the bequest to Muriel is a satisfaction of the covenant so far as her life interest is concerned.

There remains the question whether it is a satisfaction to any further extent. In *Graves v. Boyle* (2) Lord Hardwicke said that cases of satisfaction of portions by subsequent devise ought not to be extended further than they had already gone; and in *Powel v. Cleaver* (3) Lord Thurlow said that Lord Cowper and Lord Hardwicke had turned the stream of the decisions in regard to satisfaction and had fixed the rule.

In my view it would be a considerable extension of the doctrine if I were to decide that the bequest was a complete satisfaction of the covenant, as regards the interests of all persons under the settlement, by reason of the wife having entered into the covenant to settle her after-acquired property. The other cestuis que

(1) 3 Cl. & F. 146, 156.

(2) (1739) 1 Atk. 509.

(3) (1789) 2 Bro. C. C. 499, 516.

trust are not mentioned in the will, and take nothing directly under it. Under the will the bequest to the wife is absolute, but it is only in certain events that she is bound to bring the share into settlement. The covenant only extends to property to which the wife becomes entitled "during the said intended coverture." If her husband had died during the testator's lifetime the wife would have taken her share absolutely, free from the covenant. So if she had died in the testator's lifetime, leaving issue who survived the testator, her share would have formed part of her estate, under s. 33 of the Wills Act, 1837 (1 Vict. c. 26), but would not have been bound by the covenant. The rule of the Court as to satisfaction is founded on the assumption that in making the second instrument the maker of it supposes himself to be substantially satisfying the obligations of the first, but it is impossible to put such a construction upon this will as regards the interest of any other person than the wife, the legatee under the will. In *Lord Chichester v. Coventry* (1), following on the first passage before cited, Lord Romilly says: "Accordingly in these cases if the bequest be to the parent the parent may elect, or if the bequest be to the children of the marriage alone the children may elect to take under the will instead of taking under the covenant; but this cannot affect the rights of the other covenantees who take no interest under the will."

No authority was cited, and counsel stated that none could be found, where the doctrine of satisfaction was applied, and a covenantee held bound to elect, where the covenantee took no interest directly under the later instrument, but only was derivatively interested, by reason of some disposition made by the legatee.

Accordingly I determine that it is to the extent only of the interest taken by the wife in the 5539*l.* that the doctrine of satisfaction applies, and that she is put to her election.

Solicitors: *Lowe & Co., for Eaton, Son & Williamson, Liverpool; Newman, Paynter & Co.*

(1) L. R. 2 H. L. 71, 92.

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*In re* HEATHER.  
PUMFREY *v.* FRYER.

[1905 H. 3384.]

*Will—Ademption—Legacy to Child—Residue to Child and Stranger—  
Advancement to Child.*

A testator bequeathed a legacy to an adopted child to whom he stood in loco parentis and divided his residue between that child and a stranger. He made a subsequent advance to the child :—

*Held*, that even if the advance had been a portion, which on the evidence was not the case, the doctrine of ademption by subsequent portion would not have been applied in favour of a stranger against a child taking a share of residue as well as a legacy, and that neither the legacy nor the share of residue would have been adeemed.

*Montefiore v. Guedalla*, (1859) 1 D. F. & J. 93, 100; *Meinertzen v. Walters*, (1872) L. R. 7 Ch. 670; and *Fowkes v. Pascoe*, (1875) L. R. 10 Ch. 343, 351, applied.

ORIGINATING SUMMONS.

By his will dated July 28, 1901, a testator bequeathed (inter alia) the following legacies :—

To Eliza Emma Barton, the wife of Charles Arthur Barton, the sum of 50*l.*

To the said Charles Arthur Barton the sum of 500*l.*

To Mary Ellen Fryer, whom I adopted as my daughter upwards of thirty years now last past the sum of 3000*l.* (and which legacy shall be paid free from duty).

The testator devised and bequeathed his residuary real and personal estate to his executors and trustees upon trust for sale and conversion, and directed the proceeds to be equally divided between Charles Arthur Barton and Mary Ellen Fryer.

On September 10, 1902, the testator made a first codicil not material for the present purpose.

By a second codicil dated August 29, 1903, the testator provided as follows :—

“Whereas I have from time to time since the date of my said will advanced certain sums of money for the purpose of investments to my adopted daughter Mary Ellen Fryer, and whose



name is mentioned in my said will as a legatee thereunder, now I give and bequeath unto the said Mary Ellen Fryer, whatever sums of money have been so advanced by me as aforesaid for her own absolute use and benefit and except as aforesaid I hereby confirm my said will."

The testator died on June 13, 1905, leaving a substantial residue after all legacies were paid or provided for.

It appeared that the testator, who was in loco parentis to his adopted daughter and wished to provide for her, had given her several sums of money to invest for her own benefit before the date of the second codicil, and since that date he had given her (inter alia) a further sum of 1000*l.* for the same purpose.

The testator was not in loco parentis to Charles Arthur Barton.

This summons was issued to determine (inter alia) whether the 3000*l.* legacy was partially adeemed by the gift of 1000*l.*

*Duka*, for the executors and trustees.

*Eve, K.C.*, and *Romer*, for the adopted daughter. The doctrine of ademption by subsequent portion, being based on the presumption that a father intends equality between the children, is only applied against a child in favour of other children, and not in favour of a stranger: *Meinertzen v. Walters* (1); *Fowkes v. Pascoe* (2); *Theobald on Wills*, 6th ed. p. 736. It cannot, therefore, be applied in favour of Charles Arthur Barton.

*Micklem, K.C.*, and *J. M. Stone*, for Charles Arthur Barton. *Meinertzen v. Walters* (1) and *Fowkes v. Pascoe* (2) are confined to shares of residue. They do not prevent the ademption of a legacy, although a stranger may benefit by increased residue. The doctrine of ademption by subsequent portion is based, not so much on the principle of equality between children, of whom there may be only one, as on the notion that in providing for a child a father is paying a debt of nature, which presumably he does not mean to pay twice over, whereas a provision for a stranger is pure bounty, and there is no presumption against its repetition: *Ex parte Pye* (3); *Trimmer v. Bayne* (4); *Twining v.*

(1) L. R. 7 Ch. 670, 672, 673.

(3) (1811) 18 Ves. 140; 2 W. & T.

(2) L. R. 10 Ch. 343, 351.

7th ed. p. 366.

(4) (1802) 7 Ves. 508.

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*Powell* (1); *Powys v. Mansfield* (2); *Pym v. Lockyer* (3); *Montefiore v. Guedalla*. (4)

[SWINFEN EADY J. *Montefiore v. Guedalla* (4) shews that a legacy and a share of residue are on the same footing as regards ademption, and in that case the child's share of residue was held adeemed in preference to the legacy. But is there any case in which the doctrine has been applied in favour of a stranger against a child taking a share of residue, as well as a legacy?]

We are not aware of any authority, but *prima facie* the doctrine would apply to the legacy.

SWINFEN EADY J., after holding on the evidence that the successive gifts, including the 1000*l.*, were not portions, so that no question of ademption really arose, continued:—But even if the 1000*l.* were a portion, I am of opinion that in the circumstances of this case the adopted daughter would not be bound to bring it into account.

In *Montefiore v. Guedalla* (4), following on *Pym v. Lockyer* (3), it was decided that a bequest of a share of residue for the benefit of a child is subject to ademption in the same way as a pecuniary legacy. Lord Campbell L.C. said: “While it was strangely supposed that there could not be ademption *pro tanto*, there might be some colour for giving weight to the argument arising from the alleged uncertainty of the amount of a residue. But after the decision of *Pym v. Lockyer* (3), establishing that there may be ademption *pro tanto*, the cases relied upon to shew that there is a distinction on this subject between a bequest of a specific amount and the bequest of a residue, are left without any reasonable support. While some of these cases may perhaps be explained away, there are others, such as *Farnham v. Phillips* (5), before Lord Hardwicke, and *Freemantle v. Bankes* (6), before Lord Loughborough, which we should have had great difficulty in dealing with, if they had not been questioned in a higher tribunal. But the whole of that class of cases must be considered as swept away by the decision of the House of Lords

(1) (1845) 2 Coll. 262.

(3) (1841) 5 My. & Cr. 29.

(2) (1836) 6 Sim. 528; (1837) 3

(4) 1 D. F. & J. 93, 100.

My. & Cr. 359.

(5) (1741) 2 Atk. 215.

(6) (1799) 5 Ves. 79.

in *Thynne v. Earl of Glengall*. (1) That case arose upon the effect of a bequest as satisfaction of a prior covenant to make provision for a child: but it is admitted that satisfaction by a residue and ademption of a residue for this purpose cannot be distinguished."

In *Meinertzen v. Walters* (2) a testator gave the income of one moiety of his residue to his widow for life, and divided the other moiety among his children in equal shares. He advanced marriage portions to some of the children after the date of the will. The Court of Appeal held that the advances could only be brought into account for the benefit of the children inter se, and that the widow was not entitled to have her income increased by having the advances brought into account in estimating the residue. James L.J. said: "The contention of the appellant is, that if a father leaves his residue between a child and a stranger, and then makes a large advance to the child and also a large advance to the stranger, there being nothing more but the will and those advances, the law of England is this, that the child is obliged to bring what he has received into the residue, and that the stranger is not to bring in what he has received, but is to have it enlarged by that which has been given to the child." He then negatives that contention.

This case was followed by the Court of Appeal in *Fowkes v. Pascoe* (3), in which James L.J. said: "The case of *Montefiore v. Guedalla* (4) was the first case in which the doctrine of ademption or satisfaction was applied to residuary legatees; and in the case of *Meinertzen v. Walters* (2) we came to the conclusion that it could only be applied between children against a child in favour of a child, not in favour of a stranger. It would, therefore, be necessary in this case to shew, not only that the testatrix had placed herself in loco parentis to the defendant, but to his sister, of which there is no trace."

No authority has been produced where residue is given between a child and a stranger, and the doctrine has been applied against the child. I know of no such authority, and in my opinion such an application of the doctrine would work peculiar hardship.

(1) (1848) 2 H. L. C. 131.

(2) L. R. 7 Ch. 670, 672.

(3) L. R. 10 Ch. 343, 351.

(4) 1 D. F. & J. 93, 100.

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EADY J.

1906

HEATHER,  
*In re.*

PUMFREY

*v.*  
FRYER.

SWINFEN  
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HEATHER,  
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The child would have to bring advances into account, the stranger would not. This would produce inequality.

In *Meinertzen v. Walters* (1) James L.J. stated the principle of the doctrine as follows: "The principle is that it must be presumed that a father intends equality between the children; and if he leaves the residue to the children, and afterwards makes an advance to one of the children, the general rule is that such advance must be brought into hotchpot, so that the disposition of his fortune, by which he intended to produce equality among the children, may not be altered."

A rule designed to produce equality among children cannot be extended so as to reduce their shares for the benefit of a stranger. No authority compels me to do so, and I should certainly have declined to extend the rule in this way if the 1000*l.* had been a portion. I, therefore, hold that the 1000*l.* given by the testator to his adopted daughter after the date of the second codicil was not an ademption pro tanto of her 3000*l.* legacy or her share of residue, and is not to be brought into account.

Solicitors: *Henry Pumfrey & Son; Robbins, Billing & Co., for F. J. & C. Poole, Widnes; Stones, Morris & Stone.*

(1) L. R. 7 Ch. 673.

G. R. A.



## SHEPHEARD v. BRAY.

[1904 S. 2354.]

WARRING-  
TON J.

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May 14, 15,  
16, 31;  
July 17.

*Company—Prospectus—Untrue Statement—Shareholder's Action against some of the Directors—Compensation paid by Defendants—Contribution from other Directors—Evidence—Liability of Estate of deceased Director—Costs—Directors Liability Act, 1890 (53 & 54 Vict. c. 64), ss. 3, 5—Rules of Supreme Court, Order XVI., rr. 48, 54.*

The directors of a company issued a prospectus on the faith of which J. Broome applied for and was allotted shares in the company. The company went into liquidation. Broome brought an action, under s. 3 of the Directors Liability Act, 1890, against three of the directors for compensation on the ground that the prospectus contained an untrue statement. Judgment was given in his favour with costs and an inquiry as to damages directed. The defendants appealed to the Court of Appeal and the House of Lords, but both appeals were dismissed with costs. The case is reported sub nom. *Broome v. Speak*, [1903] 1 Ch. 586, and sub nom. *Shepherd v. Broome*, [1904] A. C. 342. A compromise was arrived at under which the inquiry was dropped, and Broome was paid compensation at the rate of 15s. per share, his taxed costs of the inquiry, and 700*l.* additional costs. Many other shareholders made claims, which were also compromised, and the three defendants in Broome's action and some of the other directors paid large sums in this way. They did not take advantage of third party procedure, but brought this action against the remaining directors and the executors of three of them, who had died since the prospectus was issued, to enforce, under s. 5 of the Directors Liability Act, 1890, contribution by them of their share of the compensation which had been paid:—

*Held*, that the statement of facts in the report of *Broome v. Speak* ought not to be treated as evidence, but the judgments in that case were an authority for holding on the facts proved in the present action that the prospectus contained an untrue statement.

*Held*, further, that if Broome had brought an action against all the directors, including those who were now dead, he would have succeeded; that the right to contribution, inasmuch as under the statute it arose as if from contractual relations between the parties, could be enforced against the estates of the deceased directors; and that the defendants must pay, with interest, their share of the compensation and the costs of Broome and other shareholders which had been paid; but that they were not liable to contribute in respect of the costs of the defendants in *Broome v. Speak*, Broome's extra costs, the costs of the appeals, and other payments which had been made otherwise than under the provisions of the Act.

THE London and Northern Bank, Limited, was incorporated on April 6, 1898. The directors of the company were A. J.

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Shepherd, P. Speak, Sir W. Farmer, the Hon. R. C. Grosvenor, the Hon. C. M. Knatchbull Hugessen, B. Langley, C. G. Pym, G. Bray, I. Gaunt, Sir R. J. McConnell, H. Mack, W. D. Gillies, W. W. Oswald, and C. D. Clayton. About October 20, 1898, the directors issued a prospectus, which contained a statement that the company was only a party to two contracts. On the faith of this prospectus J. Broome applied for, and was allotted on October 26, 1898, 400 ordinary shares of 10*l.* each, on which he paid 1000*l.* The company was wound up, and on December 27, 1901, Broome commenced an action against Speak, Shepherd, and Clayton for damages and compensation for loss sustained by reason of his having taken shares on the faith of the statement in the prospectus that there were only two contracts. Buckley J. held that the statement was untrue, and that Broome had established his case both under s. 38 of the Companies Act, 1867, and under s. 3, sub-s. 1, of the Directors Liability Act, 1890, ordered an inquiry what sum ought to be paid as compensation or damages, and ordered Speak, Shepherd, and Clayton to pay Broome's costs. Speak, Shepherd, and Clayton appealed, and their appeals were dismissed with costs. The case in both courts is reported [1903] 1 Ch. 586. Shepherd and Clayton appealed to the House of Lords, and on May 17, 1904, the House of Lords dismissed their appeal with costs. This appeal is reported [1904] A. C. 342. After this decision a compromise was arrived at between the parties whereby the inquiry was dropped and Speak, Shepherd, and Clayton were to pay Broome 300*l.*, viz., 15*s.* per share, his taxed costs of the inquiry, and 700*l.* for additional costs beyond the taxed costs of the litigation. These sums were duly paid by Speak, Shepherd, and Clayton, as well as large sums in respect of their own costs. Many other shareholders made claims and brought actions against the directors who were plaintiffs in the present action, or some of them. These claims and actions had been settled by payments by the present plaintiffs at the rate of 15*s.* per share and costs. They also paid two sums of 500*l.* each to the Joint Stock Association for services rendered on the settlement of some of the claims. Oswald died on May 31, 1902, and Gaunt died on December 22, 1902.

On June 21, 1904, the first seven of the above-named

directors brought the present action against the other directors and the executors of Gaunt and Oswald for a declaration that they were liable to contribute rateably with the plaintiffs to all these payments made by them, and any other payments which they might become liable to make under the Directors Liability Act, 1890, on account of the prospectus; an order for payment; and accounts and inquiries necessary for that purpose. Bray died on August 22, 1905, and the action was continued against his executors. At the trial the only defendants who continued the contest were the representatives of Bray and Gaunt.

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The plaintiffs relied on admissions made by the defendants, and on correspondence and documentary evidence. They called some witnesses, but did not call Broome or the other witnesses examined in his case.

*Astbury, K.C.*, and *Felix Cassel*, for the plaintiffs. We are entitled to recover contribution from the representatives of Bray and Gaunt under s. 5 of the Directors Liability Act, 1890, in respect of the amount we have paid: (1.) as damages and compensation to Broome in the action of *Broome v. Speak* (1); (2.) in compromise of the other claims made against us on similar grounds; (3.) costs paid to Broome; (4.) costs paid to the plaintiffs in the other actions; (5.) costs paid to claimants who did not actually take proceedings; (6.) interest on all the sums so paid; and (7.) to recover interest on the amount which the present defendants are liable to contribute. The actual amount to be contributed will have to be settled by an inquiry.

It is said that the maxim "*Actio personalis moritur cum persona*" applies, and that, inasmuch as Bray and Gaunt are dead, we have no remedy against their representatives. That maxim only applies to actions in tort, and s. 5 expressly states that contribution is to be recovered "as in cases of contract." True, the shareholders can only sue in tort, but the right to contribution between the directors is contractual: *Gerson v. Simpson*. (2) Bray and Gaunt were both alive when the writ was issued in

(1) [1903] 1 Ch. 586; affirmed sub A. C. 342.  
nom. *Shepherd v. Broome*, [1904] (2) [1903] 2 K. B. 197, 202.

WARRINGTON J. *Broome v. Speak* (1), and were directors when our liability was first incurred by issuing the prospectus.

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In cases of contract, although after the death of one co-contractor the promisee can only sue the other co-contractor, the latter can call upon the representatives of the dead man to contribute: Leake on Contracts, 4th ed. p. 47. The date of the commencement of this action for contribution is not the date at which to ascertain whether the defendants if then sued separately would have been liable, for at that time everything had been paid, and they owed the shareholders nothing. If Broome had brought the original action against them they would have been liable.

In *Broome v. Speak* (1) an inquiry was ordered into the amount of the damages. We compromised that by paying 15s. per share; and we have settled many of the other actions on the same terms. The defendants admit that that was a reasonable course to take, and they cannot dispute it now, although the precise figure was not found by the Court. The history of the case is shewn in the report of *Broome v. Speak*. (1)

[*Danckwerts, K.C.*, for the representatives of Bray. The evidence in that action is not evidence against us in this action. The plaintiffs must prove all the facts on which they rely.]

We will prove all the facts that are not admitted. *Broome v. Speak* (1) was decided on the Directors Liability Act, 1890, as well as on s. 38 of the Companies Act, 1867. So we come under the description in s. 5 of the Act of 1890 of persons who have "become liable to make any payment under the provisions of this Act." The defendants urged us to appeal, and have admitted that we were right to compromise the other claims, and they cannot now repudiate what we have done.

The defendants are liable to contribute their share of costs as well as of compensation: *Gerson v. Simpson*. (2) It is a case of joint contract, as in *Lowe & Sons v. Dixon & Sons*. (3) They are liable for the costs of the appeals, for we acted reasonably and with their consent. This is similar to contribution between

(1) [1903] 1 Ch. 586.

(2) [1903] 2 K. B. 197, 202.

(3) (1885) 16 Q. B. D. 455.



sureties, and the defendants must pay interest: *Hitchman v. Warrington J. Stewart* (1); *Ex parte Bishop*. (2)

*Gatey*, for Gillies (against whom the action was compromised during the trial), referred to *Thomson v. Lord Clanmorris* (3); *Richardson v. Willis* (4); *Shepherd v. Hills* (5); *Cork & Bandon Ry. Co. v. Goode*. (6)

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*Gore-Browne, K.C.*, and the *Hon. Frank Russell*, for the representatives of Gaunt. The plaintiffs have no right to compel us to contribute. Gaunt died before any liability was established, that is to say, before any definite amount was fixed by order or by agreement. If Broome had brought the action against Gaunt, and Gaunt had died before judgment, Broome could have recovered nothing from his estate: *Phillips v. Homfray*. (7) An action against directors under the Directors Liability Act, 1890, is an action in tort, and the maxim "Actio personalis moritur cum persona" applies: *Peek v. Gurney* (8); *Gerson v. Simpson* (9); *McConnel v. Wright*. (10) The history of the doctrine is given in *Finlay v. Chirney*. (11) Only actions on contract survive the death of the parties. If s. 5 converts the shareholder's claim into a contractual relationship, the greater part of the section is superfluous.

[WARRINGTON J. referred to *Lloyd's v. Harper*. (12)]

In order to succeed the plaintiffs must, under s. 5, prove that Broome, if he had sued us separately under s. 3, would have been able to make us liable to make the same payment as they had to make. Assuming that he could have sued us after Gaunt's death, they must shew that we should have had no defence to the action. In such an action Broome would have had to prove not only both fraud and damage to himself, as in *Smith v. Chadwick* (13) and *McConnel v. Wright* (10), but also that he was misled by the omission to disclose the contract: *Nash v.*

(1) (1855) 3 Drew. 271.

(2) (1880) 15 Ch. D. 400.

(3) [1900] 1 Ch. 718.

(4) (1873) L. R. 8 Ex. 69, 71.

(5) (1855) 11 Ex. 55; 25 L. J. (Ex.) 6.

(6) (1853) 13 C. B. 826.

(7) (1883) 24 Ch. D. 439.

(8) (1873) L. R. 6 H. L. 377, 395.

(9) [1903] 2 K. B. 197, 204.

(10) [1903] 1 Ch. 546, 558.

(11) (1888) 20 Q. B. D. 494, 502.

(12) (1880) 16 Ch. D. 290.

(13) (1884) 9 App. Cas. 187, 195.

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*Calthorpe* (1) ; and that if he had known of the contract he would not have become a shareholder : *Macleay v. Tait*. (2) It is impossible to suppose that knowledge of the contract omitted from the prospectus in *Broome v. Speak* (3) would have deterred Broome from becoming a shareholder. It only affected 7500*l.*, and the capital of the company was 2,000,000*l.* The same things would have to be proved in respect of all these claims which have been compromised.

There is no evidence against us. We admit that the facts found in *Broome v. Speak* (3), and stated in the report of that case, were sufficient to support the judgments which were delivered, and that the plaintiffs are liable to that extent ; but they are not evidence against us. No evidence has been adduced here that there was any contract which was omitted from the prospectus or any untrue statement in the prospectus. The only other admission we have made is that, if any other persons have proved their claim, 15*s.* per share is a reasonable amount to pay. That is not an admission of our liability. We should have been able to shew that we had reasonable ground for believing the statements in the prospectus were true : *Derry v. Peek*. (4)

The liability of directors to contribute arises as soon as the amount of compensation is established, but not before that : *Wolmershausen v. Gullick*. (5) Sect. 4 of the Directors Liability Act gives an indemnity to any person whose name has been improperly inserted as a director in respect of damages for which he may be made liable. That shews that the liability must be established. Till the liability is ascertained there is no complete cause of action : *Hughes-Hallett v. Indian Mammoth Gold Mines Co.* (6) Broome did not recover a definite sum ; an inquiry into damages was ordered. Directors cannot recover anything as contribution before one of them has paid more than his share. The plaintiffs have not proved that any one of them has paid more than his share. In s. 3 of the Directors Liability Act the words "shall be liable" mean

(1) [1905] 2 Ch. 237.

(2) [1906] A. C. 24.

(3) [1903] 1 Ch. 586.

(4) (1889) 14 App. Cas. 337.

(5) [1893] 2 Ch. 514.

(6) (1882) 22 Ch. D. 561.

“liable in an action.” That is shewn by the subsequent words “unless it is proved.” Sect. 4 speaks of a director who is “made liable,” and s. 5 of a person who, “if sued separately, would have been liable.” The liability arises when judgment is obtained, so we are not liable to the plaintiffs in respect of any of the claims which they have compromised. To a large extent the judgments in *Broome v. Speak* (1) were based on s. 38 of the Companies Act, 1867, and the plaintiffs have no right to contribution in respect of claims under that Act. We are only liable for compensation paid under the Directors Liability Act. We are not liable to contribute towards any costs. They are not payable under the Act: *Knight v. Hughes*. (2) In *Gerson v. Simpson* (3) costs were payable because the sureties were brought in as third parties. At all events, we are not liable to pay the costs of the appeal to the Court of Appeal or to the House of Lords: *Maxwell v. British Thomson Houston Co.* (4)

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On the facts of this case we are not liable to contribute. An agreement was entered into in 1902 that Bray and Gaunt should help the plaintiffs independently at their own expense, and should not be liable to contribute. That has been acted upon throughout. Speak did not at first join in the compromise. He settled separately, and his payments did not free the other directors. So he has no claim against us. The 700*l.* paid to Broome for his additional costs and the two sums of 500*l.* each paid to the Joint Stock Association for services rendered on settlement of some of the claims were not paid under the Directors Liability Act. The whole of these proceedings have been misconceived. The plaintiffs ought to have brought us in as third parties under the Rules of the Supreme Court, Order xvi. rr. 48, 54. Sect. 5 of the Directors Liability Act obviously refers to that form of procedure. It is impossible to obtain contribution in independent proceedings like this without proving everything over again.

*Danckwerts, K.C.*, and *A. R. Kirby*, for Bray’s representatives, adopted the argument put forward on behalf of Gaunt’s representatives, and continued:—Sect. 5 of the Directors Liability Act was passed in order to get rid of the rule laid down in

(1) [1903] 1 Ch. 586.

(2) (1828) 3 C. & P. 467.

(3) [1903] 2 K. B. 197.

(4) [1904] 2 K. B. 342.

WARRINGTON J. *Merryweather v. Nixan* (1) that there is no contribution between tort-feasors. Under the Judicature Acts rules of equity prevail. Contribution between joint contractors is of ancient date, and is founded on doctrines of equity, not upon contract: *Deering v. Earl of Winchelsea* (2); *Stirling v. Forrester* (3); *Duncan, Fox & Co. v. North and South Wales Bank*. (4) It depends on the doctrine of subrogation; the plaintiffs might have sued us in the name of Broome, but the practice has been simplified by third party procedure. A surety who discharges the liability is entitled to an assignment of all the securities held by the creditor: *Mercantile Law Amendment Act, 1856, s. 5*. There is no right of subrogation until something has actually been paid; and the doctrine depends on general principles of justice: *Ramskill v. Edwards* (5); *Robinson v. Harkin* (6); *Ward v. National Bank of New Zealand* (7); *Spottiswoode's Case* (8); *Ex parte Snowden* (9); *Gardner v. Brooke*. (10) It does not follow that all the contributors must bear the burthen equally amongst themselves: *Chillingworth v. Chambers*. (11)

Sect. 5 of the Directors Liability Act refers to the doctrine of subrogation. Broome could not have sued Bray's executors, so the directors cannot do so. The test provided by the section that contribution is recoverable from persons "who, if sued separately, would have been liable to make the same payment" was introduced to prevent such actions being brought against people who could not prove their defence; for instance, his executors could not prove the honest belief of the deceased director. The plaintiffs have not proved their case. The action of *Broome v. Speak* (12) was *res inter alios acta*, and does not affect us. A judgment in personam is no evidence against others, although a judgment in rem is evidence: *Taylor on Evidence*, 10th ed. p. 1212. Your Lordship can only act upon evidence actually adduced here. It has not been proved in this case that anybody has been damaged. It cannot be assumed that Broome

(1) (1799) 8 T. R. 186.

(2) (1787) 2 Bos. & P. 270; 2 W. & T., 7th ed. p. 535.

(3) (1821) 3 Bli. 575.

(4) (1880) 6 App. Cas. 1, 19.

(5) (1885) 31 Ch. D. 100.

(6) [1896] 2 Ch. 415, 426.

(7) (1883) 8 App. Cas. 755, 765.

(8) (1855) 6 D. M. & G. 345, 371.

(9) (1881) 17 Ch. D. 44.

(10) [1897] 2 I. R. 6.

(11) [1896] 1 Ch. 685.

(12) [1903] 1 Ch. 586.



would have succeeded against Bray. That does not make it necessary to prove all the facts over again; the difficulty is got over by the third party procedure. The plaintiffs have elected to bring a separate action, and they have not proved the facts. The admissions made by the defendants do not go far enough for the plaintiffs, and they must not be pressed beyond the object for which they were given: *Sanders v. Sanders*. (1) The point was not taken in *Broome v. Speak* (2) that Broome had not suffered damage "by reason of any untrue statement in the prospectus" within s. 3, sub-s. 1, of the Directors Liability Act. Bray said in his statement of defence that he had reasonable grounds for believing, and did believe, that the statement was true; that he did not know of the contract, and would not have become a director if he had known of it. He was not a director when the allotment was made and did not consent to it; and he never admitted that there was another agreement. Admissions made by the other directors are not evidence against us: *Ex parte Young* (3); Rowlatt on Principal and Surety, p. 150. We are not liable to contribute towards the costs of the litigation: *Potter v. London County Council* (4); or to pay interest. *Ex parte Bishop* (5) was decided on the ground that there was an implied contract to indemnify. This liability springs from subrogation, not from implied contract.

*Astbury, K.C.*, in reply. There is no obligation on us to prove over again that the defendants in *Broome v. Speak* (2) became liable to pay compensation to Broome.

[WARRINGTON J. I agree that the defendants in this case are not in a position to dispute that.]

We are entitled to take as proved the facts stated in the judgments; and the House of Lords held that there was in the prospectus the untrue statement that all the material contracts had been disclosed. The defendants here admit that the judgment was right, and that admission lets in the facts on which the judgment was based. The Directors Liability Act says that a director who is made liable is entitled to contribution from his

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(1) (1881) 19 Ch. D. 373, 380.

(3) (1881) 17 Ch. D. 668.

(2) [1903] 1 Ch. 586.

(4) (1905) 70 J. P. 35.

(5) 15 Ch. D. 400.

WARRINGTON J. co-directors, not that he must prove everything over again every time. We admit that in order to succeed in this action we must prove our liability, but we have established that.

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[WARRINGTON J. The question is whether on the materials before me I can say that, if Broome and the other claimants had brought actions against the present defendants, they must have succeeded.]

That is on the assumption that those actions were brought when the claims were made. At that time *Macleay v. Tait* (1) had not been decided. It would therefore have been unnecessary for the shareholders to prove that they would not have taken shares if they had known of the untrue statement. It is enough for us to shew that judgment was given against us, and that Bray and Gaunt were our co-directors. Damage was found by the judgments and is admitted. No evidence has been called to shew that the order made against the defendants in *Broome v. Speak* (2) would not have been made against Bray and Gaunt. There are no points which they could have raised which were not made in that case.

[He was stopped on the question whether the action survived the death of Bray and Gaunt.]

If we are entitled to contribution in respect of the amount we paid to Broome, we ask for an inquiry also in respect of the amounts paid in the actions which have been compromised. The defendants approved of the course we took, and it was impossible to issue third party notices in all these cases. Sect. 5 is not limited to third party procedure. The admission that 15s. per share was a reasonable amount to pay made it unnecessary for us to call all the claimants. We are entitled to contribution towards the costs which we have paid: *Rowlatt on Principal and Surety*, p. 238; *Kemp v. Finden* (3); *Smith v. Compton* (4); *Hammond & Co. v. Bussey*. (5) \*

*Cur. adv. vult.*

May 31. WARRINGTON J. The plaintiffs allege that they are persons who, by reason of their being directors of a company,

(1) [1906] A. C. 24.

(3) (1844) 12 M. & W. 421.

(2) [1903] 1 Ch. 586.

(4) (1832) 3 B. & Ad. 407.

(5) (1887) 20 Q. B. D. 79.

and of their having authorized the issue of its prospectus, have become liable to make certain payments under the provisions of the Directors Liability Act, 1890, and they claim to be entitled to recover contribution from the estates of three deceased co-directors and from certain living co-directors, alleging that such co-directors are persons who, if sued separately, would have been liable to make the same payments. The plaintiffs' claim is based on the 5th section of the Directors Liability Act, 1890, which is in these terms : " Every person who by reason of his being a director, or named as a director or as having agreed to become a director, or of his having authorized the issue of a prospectus or notice, has become liable to make any payment under the provisions of this Act, shall be entitled to recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment." The liability here referred to is that created by s. 3. Sect. 3 is in these terms, reading it shortly : " Where after the passing of this Act a prospectus or notice invites persons to subscribe for shares in . . . . a company, every person who is a director of the company at the time of the issue of the prospectus or notice, and every person who having authorized such naming of him is named in the prospectus or notice as a director of the company or as having agreed to become a director of the company . . . . shall be liable to pay compensation to all persons who shall subscribe for any shares, debentures, or debenture stock on the faith of such prospectus or notice for the loss or damage they may have sustained by reason of any untrue statement in the prospectus or notice, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless " certain things are proved. What those are I need not read. The plaintiffs Shepheard and Speak and the defendant Clayton were the defendants in an action of *Broome v. Speak* (1) brought by a shareholder under s. 38 of the Companies Act, 1867, and under s. 3 of the Directors Liability Act, 1890. The remaining plaintiffs are co-directors with the plaintiffs Shepheard and Speak, and they and the plaintiffs Shepheard and Speak have either been sued by other shareholders, or have been

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threatened with actions by them, and have satisfied their claims or have contributed to payments made by others of the plaintiffs, including the payments made in *Broome v. Speak*. (1) The several defendants are in this position : Bray was a director who joined in the issue of the prospectus. He has died since the commencement of the action, namely, in August, 1905, and the action is proceeding against his executors. Isaac Gaunt, another director who joined in the issue of the prospectus, died in December, 1902, and the defendants Simpson, Butler and Wade are his executors. The defendants McConnell, Mack, and Gillies have settled with the plaintiffs. The defendant Violet Emma Oswald is the executrix of a deceased director whose estate is insolvent, and the defendant Clayton has contributed 1000*l.* and is now insolvent. The last two have not defended the action, which comes on against them upon motion for judgment. Substantially, the question is whether the estates of Bray and Gaunt respectively, or either of them, are, or is, liable to make the contribution claimed. There is a serious question of law raised by the executors of Bray and Gaunt respectively, as to whether the cause of action, if any, against Bray and Gaunt ceased with their deaths. For the sake of simplicity I will for the present deal with the case as if they were alive and were defendants to the action. What, then, are the questions I have to decide? They seem to me to be, first, whether the plaintiffs have become liable to make any payments under the provisions of the Act; and, secondly, whether Bray and Gaunt would, if sued separately, have been liable to make the same payments. It is admitted that in *Broome v. Speak* (1) it was found that the prospectus contained an untrue statement, and further that the plaintiff in that action was entitled to the relief granted to him as against the defendants to that action. Relief was granted to him under the Act in question, as well as under the Companies Act, 1867. This amounts, in my opinion, to an admission that the plaintiffs Speak and Shephard and the defendant Clayton have become liable to make a payment by way of compensation under the provisions of the Act, namely, the payment of 15*s.* per share which was agreed to in the course of an inquiry

(1) [1903] 1 Ch. 586.



directed in that action. This admission, however, goes only a little way, inasmuch as the contribution claimed is not confined to the liability in *Broome v. Speak*. (1) I think the questions I have mentioned really resolve themselves into one—namely, whether upon the facts proved or admitted in this action, an aggrieved shareholder would have been entitled to succeed against all the directors, including Bray and Gaunt.

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I find the facts so proved or admitted to be as follows: The name of the company is the London and Northern Bank, Limited. The plaintiffs and Bray and Gaunt, and the defendants McConnell, Mack, Gillies, and Clayton, with one Oswald, deceased, were directors of the company and joined in the issue of the prospectus in question, which contained a statement that the only contracts to which the company were parties were two, viz., one of May 9, 1898, and one of September 26, 1898. The aggrieved shareholder, or plaintiff in the supposed action against all the directors, applied for shares on the faith of the prospectus, and was allotted a certain number of shares accordingly. He alleges that there was in fact at least one other contract to which the company was a party, and that the above-mentioned statement is untrue. It is admitted by Bray that one Bowden was the promoter of the company, and, by the executors of Gaunt, that the commission to which I shall hereafter refer was payable to the promoter. As I shall shortly explain, I find that this commission was payable to Bowden. As against Bray and Gaunt, therefore, I find that Bowden was the promoter.

On September 21, 1898, a letter was written by one Haddock, describing himself as trustee for the company, to one Craig in the following terms: "In consideration of your advancing me the sum of 14,250*l.* to enable me to pay the same to the Leeds Joint Stock Bank, Limited, as a deposit on the purchase of their undertaking and assets, and your taking the risk of forfeiture, I hereby agree to repay the same on the directors going to allotment or on October 30 next, together with 7500*l.* bonus for such loan."

The purchase referred to in this letter was a purchase by the company, as appears by a minute of the directors dated September 7, 1898. The deposit, therefore, was a deposit to

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be paid on a purchase by the company. On September 27, 1898, a meeting of directors was held at which the following resolutions were passed: "That the agreement dated September 26, 1898, for the purchase of the Leeds Joint Stock Bank, Limited, and made between the said Leeds Joint Stock Bank, Limited, of the one part and John Daniel Haddock as trustee for this company of the other part, be read and adopted on behalf of the London and Northern Bank, Limited, and the seal affixed thereto, it being understood that the bank incur no liability under such agreement either to complete the purchase or to find the deposit therein referred to, such deposit having been found by Mr. Craig at his own risk. The commission note given by Mr. Haddock to Mr. Charles E. Craig (in consideration of the latter finding the deposit and risking same in connection with the purchase of the Leeds Joint Stock Bank, Limited) agreeing to pay a commission of 7500*l.* on the purchase of the Leeds Joint Stock Bank, Limited, was produced and read. It being arranged that the adoption of the said commission note should be recommended for confirmation at the next meeting of the board, when a fuller attendance of the directors might be present."

These resolutions shew two things: (1.) that the deposit was admitted by the company to have been found by Craig at his own risk; and (2.) that the commission of 7500*l.* was in respect of this transaction.

The matter came again before the board on October 1, when the following resolution was passed: "That in consequence of Mr. Craig having found the deposit at his own risk the board agrees to repay the same, with a bonus of 7500*l.* if the directors go to allotment and when the purchase is completed." The executors of Gaunt admit that this resolution amounted to an agreement by the company to pay the commission to the promoter, whom I find to be Bowden. Bray, however, makes no such admission, and is entitled to insist, as he does, that the resolution departs from the terms of the letter of September 21, and is, therefore, in reality a fresh proposal only on the part of the company, and that, so far, there is no agreement.

On the same October 1, 1898, Haddock, in the name of the temporary secretary of the company, wrote the following letter

to Craig: "I am instructed to acknowledge receipt of your letter of 21st ult., which I placed before my directors at their meeting to-day, and to say that in consequence of your having introduced the business and carried through the negotiations and found the deposit in connection with the purchase of the Leeds Joint Stock Bank, Limited, my directors agree to repay you the same together with a bonus of 7500*l*." This letter, of course, went beyond the authority given by the resolution.

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On October 10, 1898, however, at a meeting of directors the following resolution was passed: "That after full discussion, and hearing the views of the directors of the Leeds Joint Stock Bank, Limited, and upon the chairman giving Mr. Bowden assurance that his right to receive proper remuneration for commission on introducing the business of the Leeds Joint Stock Bank, Limited, and raising the necessary deposit shall be honourably met at a future meeting of the directors of the London and Northern Bank, Limited, it is resolved, with the assent of Mr. C. E. Craig, that the contract contained in the letter of September 21, 1898, be cancelled, and that the subject be adjourned to a future meeting of the board"; and the prospectus as altered was submitted and provisionally approved. I infer from the reference to Bowden in the resolution that he was present.

On October 18 Craig wrote to Haddock the following letter: "Referring to the letter which you wrote to me, dated September 21, 1898, I understand that the directors of the London and Northern Bank have passed a resolution to the effect that the claim which I may have for commission in introducing the business of the Leeds Joint Stock Bank, Limited, or for raising the necessary deposit, shall be honourably and properly met. Having regard to that assurance, I am quite willing to agree to the terms of your letter to me being cancelled and the arrangement there suggested as being considered at an end."

The minutes of October 10 were read and confirmed at a meeting of directors held on October 20. Messrs. Bray and Gaunt were appointed directors at this meeting, their appointment being the first business after the confirmation of the minutes of the previous meeting. Messrs. Bray and Gaunt are

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entered as present, and at this meeting the prospectus was read and considered again, and it was resolved that, as altered, the same be adopted as the prospectus of the company, and that it be issued to the public forthwith. One of the alterations was the omission of all mention of the letter of September 21, 1898, no doubt in consequence of what had taken place, and I think the inference is irresistible that Messrs. Bray and Gaunt either were present when the resolution of October 10 was read, or were informed by their co-directors of that resolution and of the letter of October 18.

The resolution of October 10 in my opinion shews that the commission referred to in the letter of September 21 was in fact payable to Bowden, the promoter, and that Craig was merely acting on his behalf, and I find as the result of the facts I have stated that on October 10, 1898, a verbal contract was made between the company of the one part and Bowden of the other part that, in consideration of the cancellation of that which the company acknowledge to be a contract contained in the letter of September 21, 1898, the company would pay to Bowden a fair quantum meruit for his commission in finding the deposit. Bowden's part of this contract was performed by the letter of October 18. In my opinion there was, at the date of the prospectus, a contract to which the company was a party in addition to the two referred to in the prospectus: and the statement therein that those were the only two contracts was untrue. I have carefully avoided placing any reliance on any statement of fact found in the report of *Broome v. Speak* (1), but I consider that I am entitled to treat that case as an authority for holding that, on the facts as I find them to be proved or admitted in this case, there is in law a contract to which the company was a party. I refer particularly to a passage in the judgment of Buckley J. (2), and to one in the judgment of the Master of the Rolls. (3) The prospectus, therefore, contained an untrue statement.

It remains to consider whether upon the evidence before me the supposed plaintiff has suffered loss or damage by reason of such

(1) [1903] 1 Ch. 586.

(2) [1903] 1 Ch. 599, 600.

(3) [1903] 1 Ch. 615, 616.



untrue statement. It is admitted that he applied for his shares on the faith of the prospectus, but it is said that this is not sufficient, and that he must further prove that if he had known the truth he would not have applied for his shares. In support of this proposition *Macleay v. Tait* (1) is relied upon. On the other hand, in *Broome v. Speak* (2), before Buckley J., and in the Court of Appeal, and in the same case in the House of Lords sub nom. *Shepherd v. Broome* (3), it was considered sufficient that the plaintiff had applied on the faith of the prospectus. Am I to hold that, if the present case were to come before the House of Lords, it would decline to follow its previous decision on the same facts in *Shepherd v. Broome* (3), and prefer its decision on different facts in *Macleay v. Tait* (1)? I cannot come to that conclusion. The matter is thus dealt with by Buckley J. (4) He says this: "Did the plaintiff rely upon the prospectus so that he can succeed by reason of the falsity of the statements? It is unintelligible to say that a person relied upon a fact which he was not told, or relied on his not being told a fact, and when you call a man after the event to say whether, if he had known a further particular fact, he would have done something or not, speaking for myself, it is so difficult to say exactly what a few years ago you would have done under different circumstances, that I should regard that evidence as of very little value. Be the man the most honest man possible, it is so easy to be wise after the event, that it is difficult for any man to say what he would have done under circumstances which did not arise. It is too much to expect of him that he should be able to say fairly what he would have done under those altered circumstances. The test I think to be applied is—it has been so stated by Lord Halsbury, and was so stated in *Smith v. Chadwick* (5), and will be found in many cases—that if you find that the matter withheld is such as that if disclosed it reasonably would deter or tend to deter an ordinarily prudent investor from applying for the shares, then he is entitled to relief. As to that I will read only one passage from the evidence of Sir Robert

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(1) [1906] A. C. 24.

(3) [1904] A. C. 342.

(2) [1903] 1 Ch. 586.

(4) [1903] 1 Ch. 604.

(5) 9 App. Cas. 187.

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McConnell. He, being called by the defendants, was asked: 'Supposing you had been told that the promoter of this company, Bowden, had been promised a commission of 7500*l.* for finding this deposit, and that the chairman of the company was going shares with him in it, would you have had anything to do with the concern? A.—I would have retired from the board forthwith. Q.—You would not have touched the thing? A.—Certainly not.' I agree that that involves another element—namely, 'that the chairman was going shares with him in it'; but, subject to that, Sir Robert McConnell said that if he had known of this 7500*l.* story he would not have touched it. Messrs. Bray and Gaunt, two directors of the Leeds Joint Stock Bank, who attended the meeting of October 10, regarded this as a thing which was wholly wrong. Can I say that this plaintiff, if he had known it, would not have taken the view that Messrs. Bray and Gaunt took, or that Sir Robert McConnell took? It appears to me I am entitled to say for the plaintiff, 'This is a thing which it was very material to you to know; what you would have done I cannot tell: but here is a material thing which has not been disclosed to you, and therefore you are entitled to relief.''' Now, in reference to this passage, I have not before me the evidence to which the learned Judge refers, but I think I am justified in concluding from his reference to the nature of the contract, which is not disclosed, that the learned Judge would, without this evidence, have arrived at the same conclusion. The result in my opinion is this, that consistently with *Macleay v. Tait* (1) the Court is at liberty to infer from the nature of the undisclosed fact that if an applicant for shares had known the truth he would not have applied. This inference I am prepared to draw in the present case. It seems to me that if the supposed plaintiff had known that the company to which he was asked to subscribe was under a liability to pay to its promoter a commission, the amount of which was unascertained and might prove very considerable, such fact would have had a deterrent effect upon his mind. The result is, therefore, that the plaintiffs have become liable to make payments under the provisions of the Act, and Bray and Gaunt would, if living,

(1) [1906] A. C. 24.

be liable to make the same payments, and the plaintiffs would be entitled to contribution. WARRINGTON J.

But it is said that, whatever cause of action the plaintiffs may have had against Bray and Gaunt, there is none against their executors. They say, and say rightly, that they (the executors) are not persons who, if sued separately, would have been liable to make the payment in question, because the act on which the supposed plaintiff would rely is a tort committed by the testator, and *actio personalis moritur cum persona*. The section provides that a person who has become liable shall be entitled to recover contribution "as in cases of contract" from any other person who, if sued separately, would have been liable. Now, in cases of contract the right to recover contribution arises (except in cases of express stipulation), not from any notion of implied contract, but as an equitable right springing from the relations of the parties as persons liable for the same debt. The right in my opinion exists from the commencement of those relations, though there may be no means of asserting it by action until one of the parties has met the common obligation, or more than his due proportion thereof, or is, at all events, in imminent danger of being compelled to meet it: see *Wolmershausen v. Gullick* (1), and the cases there cited. Apply this to the words of the statute in the present case. "As in cases of contract" must mean as in cases such as I have referred to, where the right of contribution arises from certain contractual relations. The statute tells you in effect that you are to treat the liabilities of the several directors to a shareholder as for this purpose contractual liabilities and their relations to him as contractual relations: see *Gerson v. Simpson* (2) and the judgment of the Lord Chancellor. (3) It follows that, if I am right in the views that I have expressed as to the right of contribution in cases of contract, such right in cases under the statute also exists from the commencement of the relations giving rise to the common obligation—namely, at the time when the shareholder incurs loss by reason of the untrue statement in the prospectus. The correlative obligation to make contribution is one which in cases of contract could be enforced

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(1) [1893] 2 Ch. 514.

(2) [1903] 2 K. B. 197.

(3) [1903] 2 K. B. 200.

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— against the executors of a deceased co-contractor, and in my judgment the statutory obligation can also be so enforced. This argument on the part of the defendants, the executors, founded on the maxim “Actio personalis moritur cum persona,” therefore fails.

The next question is, what is the extent of the liability? There were fourteen directors; two are insolvent, the remaining twelve must therefore *prima facie* contribute equally. But of course due account must be taken of sums recovered from those who have not paid their full shares. As to the sums paid for compensation for loss or damage, it is admitted that 15s. per share is a reasonable sum, and therefore the defendants will be liable to contribute their share to such sums as have been paid under this head, not exceeding 15s. per share in cases where a shareholder has consented to accept this sum in satisfaction. If there are any cases in which a shareholder has been actually found to be entitled to a larger sum, the plaintiffs would be entitled to contribution to this. As regards the sum of 700*l.* paid to Broome for his extra costs, and the two sums of 500*l.* paid to the Joint Stock Association on the compromise of certain of the claims, it seems to me that they are not payments for which the plaintiffs have become liable under the provisions of the Act, and the defendants therefore are not liable to contribute to them. So also as regards the plaintiffs' own costs of the previous action. I cannot see how the defendants can be made to contribute to them. But as to the costs of the plaintiff Broome of the action of *Broome v. Speak* (1), up to and including judgment, and the costs paid to the other claimants, I think these may fairly be said to be payments made under the provisions of the Act, inasmuch as it is only by action or by agreement that the amount of compensation can be ascertained, and the Legislature must, I think, be taken to have contemplated the costs paid to claimants as falling within the liability. As regards the costs in the Court of Appeal and the House of Lords, I do not see how, in the absence of a special contract, the defendants can be made liable to contribute to them, and on the evidence I find that there is no such contract.

There are certain special defences requiring notice. Reliance

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is placed in the defences of Bray and Gaunt on the correspondence and interviews of January, 1902, as amounting to an acceptance by the plaintiffs of the assistance offered by Messrs. Bray and Gaunt as being in satisfaction of their claim under the Act. The Act is never mentioned, and the conclusion I have come to is that the assistance given by Messrs. Bray and Gaunt was treated as nothing more than their contribution to the efforts of the defendants in *Broome v. Speak* (1) to defeat Broome's claim.

Then Bray says he did not assent to the resolution to go to allotment, and, therefore, he ought to be excused. I can find no ground for this in the Act. He would, notwithstanding that fact, have been liable to an aggrieved shareholder, therefore he is liable to the plaintiffs.

Then it was said, Speak at any rate cannot recover because he settled separately in *Broome v. Speak* (1), and his payment did not free the others. This may be true when the payment was originally made, but such payment has since been included in the 15s. per share and has thus contributed to the satisfaction of the claimants' demands, and I think, therefore, Speak is now in the same position as the others.

The plaintiffs are entitled as against the executors of Oswald and the defendant Clayton to the same relief as against the estates of Bray and Gaunt. The form of order requires some consideration. I think the following will probably meet the case: Declare that the plaintiffs respectively are entitled to contribution from the estates of George Bray, Isaac Gaunt, and W. W. Oswald, and the defendant Clayton respectively, to the payments made by them respectively in respect of the following matters—namely, (a) compensation to persons who subscribed for shares on the faith of the prospectus mentioned in the first paragraph of the statement of claim, the amount of such compensation not to exceed 15s. per share or such larger sum, if any, as may have been adjudged, as the result of inquiry, to be payable to any such person. (b) The plaintiff's costs of the action of *Broome v. Speak* (1) up to and including judgment. (c) Costs paid to other persons who applied for shares as

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aforesaid, whether under judgment in actions brought by them respectively or under agreement. And let the following inquiries be made. First, an inquiry what sums have been paid by the plaintiffs respectively in respect of the several matters aforesaid. Secondly, an inquiry how much is due from the estates of Bray and Gaunt respectively to each of the plaintiffs, having regard to the sums received from other persons liable to make the same payments and to the insolvency of the estate of Oswald and of the defendant Clayton. Liberty to apply for payment of the sums found due, and liberty to apply for administration of the estates of Bray and Gaunt in case Bray's executors and Gaunt's executors do not admit assets. Bray's executors, Gaunt's executors, Oswald's executor, and the defendant Clayton must pay the costs of the action up to and including judgment; subsequent costs will be reserved. The plaintiffs are entitled to interest at 4 per cent. on the sums which each defendant is liable to pay to the plaintiffs as from the date at which the defendants ought to have paid it.

July 17. The defendants now moved to vary the minutes of the order by striking out the words "or such larger sum, if any, as may have been adjudged as the result of inquiry to be payable to any such person." Warrington J. directed that these words should be struck out and the following words inserted in their place, "but this is not to extend to any moneys paid into Court in actions which are still pending."

His Lordship also directed the insertion after the words "having regard to the sums received from other persons liable to make the same payments" of the following, "or from the defendants Sir R. J. McConnell, Hugh Mack and W. D. Gillies or either of them." It was alleged on this point that these defendants had compromised on the footing that they had to contribute more than they would have been liable to pay under his Lordship's judgment; that the plaintiffs had in consequence received too much, and that the representatives of Bray and Gaunt ought to have the benefit of these payments. *Ashhurst v. Mason* (1) was referred to. The representatives of Bray and

Gaunt further asked that they should only be ordered to pay two-thirds of the costs of the action, on the ground that Gillies, who had compromised during the hearing, must be taken to have paid one-third. His Lordship declined to allow this variation, inasmuch as when judgment was given the representatives of Bray and Gaunt were the only defendants before the Court.

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Solicitors: *Waterhouse & Co.; Parker, Garrett, Holman & Howden; Helder, Roberts & Co., for Simpson & Co., Leeds.*

H. C. R.

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DISTRICT COUNCIL.

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*Local Authority—Electric Lighting—Land acquired under Special Act for Electric Generating Station—Erection of Refuse Destructor on part of Land so acquired—Combined Scheme—Ultra Vires—Injunction—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 175—Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), s. 10—Electric Lighting (Clauses) Act, 1899 (62 & 63 Vict. c. 19), s. 1; Sched., clauses 2, 8.*

A local authority, acting under the powers given to them by a provisional order duly confirmed, which incorporated the Electric Lighting Acts, purchased land by agreement for the purpose of erecting thereon works for generating electricity. Before the purchase they had determined to adopt a scheme, proposed by their engineer, under which they were to erect a refuse destructor on part of the land and use the surplus heat produced by the consumption of refuse in aid of their machinery for generating electricity. The council had power under the Public Health Act to acquire land for the purposes of erecting a refuse destructor:—

*Held*, as a matter of fact, that the council had acquired the land in exercise of their powers under the Electric Lighting Acts, and not under the Public Health Act.

*Held*, also, that the erection and use of the refuse destructor was not ancillary to the supply of electricity, and was therefore ultra vires and must be restrained.

Decision of Farwell J., [1905] 2 Ch. 441, affirmed.

APPEAL from the decision of Farwell J. (1)

This action was brought by the Attorney-General at the

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relation of the trustees of the Llanover Estates, in Wales, which included land in the urban district of Pontypridd, for an injunction to restrain the defendant council from erecting a refuse destructor upon land acquired by them from the trustees.

The facts are fully stated in the report of the case in the Court below, and the following summary is thought sufficient to explain the argument and judgments in this Court.

The council were the local and also the sanitary authority for the urban district of Pontypridd. As such local authority they obtained in the year 1901 a provisional order under the Electric Lighting Acts, 1882 and 1888, authorizing them to supply electricity within their district. This order was confirmed by the Electric Lighting Orders Confirmation (No. 6) Act, 1901. In September, 1902, the council, acting under the powers conferred on them by the said Acts, agreed with the trustees to purchase from them a piece of land within the district, containing about an acre and a half, for 1125*l.*, and this was conveyed to the council on December 3, 1902. The council had before obtaining their provisional order determined to adopt a scheme, suggested by their electrical engineer, for erecting a refuse destructor in connection with their works for generating electricity, and to use the heat developed by the destruction of the refuse for the purpose of generating steam to be used as an auxiliary motive power for driving dynamos. The council were bound as a sanitary authority to dispose of the refuse in some way, and had power under the Public Health Act, 1875, to acquire land for the purpose of erecting thereon a refuse destructor. In their negotiations with the trustees they had never mentioned their intention to erect a refuse destructor, nor had they referred to their powers under the Public Health Act.

In May, 1902, the council applied to the Local Government Board for their sanction to the council raising a loan of 55,000*l.* for the erection of a generating station and other works authorized by the Electric Lighting Order of 1901, and a loan of 12,000*l.* for the erection of a refuse destructor. The Board, after an inquiry, sanctioned a loan of 49,000*l.* for electric purposes, but refused to sanction any loan for the destructor, on the ground



that they had no power to authorize the use of the land for any purpose other than that for which it was acquired. The council asked the trustees to accept a conveyance from the council of the part of the land required for the erection of the refuse destructor and reconvey it to the council for that purpose. The trustees refused. The council then went through the form of selling this land as surplus land to their own clerk and buying it back at the same price for the purpose of erecting a refuse destructor. No money actually passed, but the price was credited to the electric lighting account and debited to the sanitary account. Both Farwell J. and the Court of Appeal held that the transaction had no effect whatever on the powers of the council as to using the land.

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In January, 1904, the council commenced building a refuse destructor on the land so purported to be acquired from their clerk, and in April, 1904, this action was commenced.

The council's statement of defence alleged that they had acquired the land by agreement for the purposes of the combined scheme advised by their engineer.

Farwell J. granted the injunction asked. (1)

The council appealed.

*Danckwerts, K.C., and R. J. Parker*, for the defendants. The scheme of the defendants throughout has been to erect on the land acquired from the Llanover trustees a refuse destructor in conjunction with an electric generating station. Under the Public Health Act, 1875, s. 43, the defendants were bound to provide for the removal of refuse. They had power to purchase land by agreement for that purpose under s. 175, but they had no compulsory powers, for they had not set in motion the machinery of s. 176. They also had power, under the order obtained from the Board of Trade and the Electric Lighting Acts incorporated therewith, to acquire lands by agreement for the purpose of supplying electricity, but they had no power under these Acts to acquire land compulsorily. The expenses of the local authority under the Public Health Act, 1875, and under the Electric Lighting Acts would be borne in the same way, viz.,

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by the district rate ; neither the contract for the purchase of the land in question nor the conveyance contained any reference to the powers under which the land was acquired. Farwell J.'s only objection to the scheme is that the defendants have not allocated so much of the land to electric lighting purposes and so much to destructor purposes. We submit that no such allocation was necessary, and that the defendants can justify the scheme, either under both Acts or under the Electric Lighting Acts alone. Practically it is immaterial for which purpose the land is used, because the incidents of the user are the same whether the land was acquired for the one purpose or the other. But, assuming that the land was acquired under the Electric Lighting Acts, it was acquired for the conjoint scheme, and the question really is whether the utilization of the refuse, which the defendants were bound to consume, as fuel to supply steam for the driving of the dynamos, is not reasonably incidental to the generation of electricity, the main purpose for which the land was acquired. The authorities shew that anything which may be fairly regarded as incidental to, or consequential on, that which the Legislature has authorized ought not to be held to be ultra vires. As was stated by Lord Halsbury in *London County Council v. Attorney-General* (1), the law on this point is comprised in the cases of *Ashbury Railway Carriage and Iron Co. v. Riche* (2) and *Attorney-General v. Great Eastern Ry. Co.* (3)

*Attorney-General v. Sunderland Corporation* (4) is a very strong case in favour of the defendants. There land was acquired for a recreation ground, and it was held that the building of a museum and library was reasonably conducive to the purposes for which the land was acquired, though the building of a town hall was not. Farwell J. lays down the principle that where a corporation, authorized to acquire land, acquires it for a particular purpose they cannot, without the leave of the Legislature, use it for any other purpose. That proposition is too wide. Prima facie the corporation are trustees for the purpose for which the land was acquired, but they may use the land for any purpose which is not inconsistent with that purpose. That is practically

(1) [1902] A. C. 165, 167.

(2) (1875) L. R. 7 H. L. 653.

(3) (1880) 5 App. Cas. 473.

(4) (1876) 2 Ch. D. 634.

the effect of *Attorney-General v. Teddington Urban Council* (1) and *Attorney-General v. Hanwell Urban Council*. (2) In both cases the land was acquired under compulsory powers, and there was a clear breach of trust. In *Attorney-General v. Southampton Corporation* (3) the basis of the judgment was that public rights had intervened. In this case the land was acquired voluntarily, and the defendants are using it exactly for the purposes for which they acquired it. They ought not to be required to appropriate any particular portion to one part of their purpose. The result of Farwell J.'s judgment, by compelling local authorities to exercise their powers, so to speak, in compartments, will seriously fetter their action in carrying out their duties under the various Acts with which they have to deal.

*Upjohn, K.C.*, and *Hornell*, for the plaintiffs. A statutory corporation having a statutory power to acquire land for a certain purpose can only do so for that purpose. They cannot acquire land at large and then say by a kind of ex post facto discretion we will devote so much to purpose A. and so much to purpose B.

[COLLINS M.R. Would it be possible to buy land under two powers and to use the whole for both purposes indiscriminately?]

There is no authority on the point, but a very strong reason against it is that the corporation are bound to keep separate accounts of what they do under each Act, and it would be impossible to distinguish between the two purposes if the land were used for both. That was the origin of the fictitious sale in this case. As regards the purpose for which the land may be used, there is no distinction between a voluntary and a compulsory purchase. This case is covered by *Attorney-General v. Teddington Urban Council* (1) and *Attorney-General v. Hanwell Urban Council*. (2) As regards the meaning of incidental, *Attorney-General v. London County Council* (4) shews that it is not enough that the minor purpose can conveniently and advantageously be made to subserve the main purpose; and see *Colman v. Eastern Counties Ry. Co.* (5) A corporation will not be allowed under the

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(1) [1898] 1 Ch. 66.

(2) [1900] 2 Ch. 377.

(3) (1859) 1 Giff. 363.

(4) [1901] 1 Ch. 781; [1902] A. C. 165.

(5) (1846) 10 Beav. 1.

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guise of assisting the main undertaking to set up what is really a different undertaking. Here the defendants never intended to exercise any powers under the Public Health Act; they were acting throughout under the electric lighting order, and they thought that the refuse destructor was incidental to their powers under that order.

*Danckwerts, K.C., in reply.*

COLLINS M.R. This is an appeal from the decision of Farwell J. in an action brought by the Attorney-General on the relation of the trustees of the Llanover Estates against the Pontypridd Urban District Council; and the learned judge has at the instance of the plaintiff granted an injunction restraining the district council from using a certain refuse destructor under circumstances which I will state as shortly as I can. [His Lordship stated the facts shortly, and proceeded:—] The points which arise in this case are these: The urban district authority, being a statutory body, have no powers except such as are derived from their statute or can be reasonably inferred as incidental or necessary thereto, and consequently the question arises, in the circumstances which I shall have to detail in a moment, whether or not under their powers they were authorized in using the plot of land which they bought from the trustees for the purpose of building and erecting a refuse destructor.

That, of course, raises two questions partly of fact and partly of law. The first question is, under what powers did the authority acquire this site? They are a sanitary authority, and they have powers under the Public Health Act, and they have powers now by virtue of the order granted to them under the Electric Lighting Acts.

The learned judge has found, upon that issue, that they unquestionably acquired this land in the exercise of their powers under the Electric Lighting Acts. That is an inference of fact, and we have to examine it a little more in detail; but I may say at the outset that I entirely agree with Farwell J. in the conclusion of fact at which he has arrived upon that point.

Having found as a fact that the powers exercised by the council were those under the Electric Lighting Acts, the next



point is, do those powers, or do they not, cover the right to build and use a refuse destructor? Now if I am right in the conclusion I have come to on the first point, we can only arrive at the conclusion that the refuse destructor was authorized if it was necessary and incidental to the supply of electricity. Those are the words of the statute itself. It may be that they are not stronger in their limitation than other paraphrases carrying the same idea which are to be found distributed throughout the authorities which deal with questions of ultra vires in relation to statutory powers. I shall have to refer to some of those authorities presently. But the question I am now dealing with is whether or not the refuse destructor was really a portion of the electric generating plant; whether it was something incidental to the main purpose, and therefore covered by the authority to carry out the main purpose, or whether, in truth and in fact, it was an independent undertaking of a different nature by which it was found to be convenient, from the standpoint of an authority under an obligation in respect of removing refuse, to combine the purpose of discharging that obligation with the purpose of generating electric power. The learned judge has come to the conclusion that it was not incidental and necessary to the supply of electricity, but that it was really undertaken, alio intuitu, to enable the council to carry out their duties, as a sanitary authority, to get rid of the refuse at the same time and on the same land as they were carrying out their purpose of generating electricity. In his view that did not make the destructor an incident of, or a necessary adjunct for the carrying out of, the main purpose of the electric lighting. He treated it as a separate undertaking, not something done under the powers of the Electric Lighting Acts; and therefore, in trying their rights by the standard of what powers they took under the Electric Lighting Acts, it was ultra vires, and on that ground he restrained them.

Now it is necessary to examine very shortly the circumstances under which the council bought the land. [His Lordship examined at length the correspondence of the council with the trustees and the Local Government Board and some of their minutes, and proceeded :—] I do not think I need go through

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the minutes in detail on this part of the case, because I think the real material point is, Aye or No, was the refuse destructor merely ancillary to, so as to be made part of and subservient to, the main purpose of the electric generating station, the electric works, or is it an independent work?

It does not appear to me to be very material to the decision of that question whether the council had or had not in their minds, simultaneously with the intention of acquiring a site for electric works, the intention of putting on that site a refuse destructor. If that was their intention, but the refuse destructor did not become part of those electric works, it is just as much *ultra vires* as if they did not form the intention until long after they had conceived the idea of getting a site for their electric works.

In my opinion, upon the correspondence which I have read, it is obvious all through, first, that the council acquired the site for the purposes of their electric works; and, secondly that at the end of the matter, when they came to deal direct with the Local Government Board, the correspondence is wholly on the footing that it was acquired for electric purposes, and that it has been used for other purposes. When the difficulty was pointed out the council did not seriously combat this, but accepted it, and tried to get over it by selling the land and purchasing it back again. I do not think, therefore, that we are really at this stage of the discussion troubled by the point which was pressed in the first instance by the appellants, that the council were putting in operation their powers as a sanitary authority of acquiring a site for the destructor, as distinguished from their powers under the Electric Lighting Acts of acquiring land for the purposes of electric lighting or supplying electric energy. What they did was done under the latter powers.

Now that brings us to the legal question in this case. It seems to me to be quite clear that this is an authority which is bound by statute. It derives its existence from the statute, and its right and obligations must be measured by the statute. [His Lordship read s. 10 of the Electric Lighting Act, 1882, and proceeded:—] Trying the rights of the council by the standard of that power, which it seems to me is the only one they invoked,

they cannot, in point of law, justify buying or using land unless they can say that they have bought it and used it for the purposes of supplying electricity, and for doing all such acts and things as may be necessary and incidental to such supply.

Therefore the question is, Is this refuse destructor within those words? It seems to me, as an inference of fact, in which I agree with the learned judge, that it never would have occurred to this authority to think of using refuse as fuel for the purpose of making electricity if they had not found themselves under an obligation to destroy the refuse. As they were under that obligation, it might be the most economical way of doing that which they could not avoid doing, to utilize some part of the heat produced in the process of destroying the refuse for the purpose of generating electricity. It would never occur to any body of persons or to any individual who was going to make electrical works to produce electrical energy to look to refuse for fuel. It seems to me to be quite unsupported by any evidence, and certainly to be contrary to the ordinary view of any person possessing ordinary common sense, that such a body or person would go to the expense of building a chimney and all the works necessary for the purpose of destroying refuse in order to get a little more heat for generating electricity. The evidence read to us shews that the amount of heat which would be got for electric purposes from the consumption of refuse was really very small at best, and, having regard to the conditions under which the refuse had to be destroyed and the time of day at which it had to be done, I think the fair result of the evidence is that the destructor was of little or no advantage for the mere purpose of supplying electric energy. It seems to me that the evidence is practically conclusive that the refuse destructor was not an incident of the generating of electric energy at all, but that the authority in constructing it were fulfilling another purpose, and were complying with another statutory obligation, by getting rid of their refuse, and therefore its construction is not to be looked on as ancillary to the main purpose.

If that issue of fact is decided against the appellants, and if the only powers which were really invoked and under which they were acting were powers under the Electric Lighting Acts, it

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C. A. concludes this case. In my opinion, those are the issues, and  
1906 those are the answers upon the questions of fact.

ATTORNEY- We have had a great many cases cited to us, and I do not think  
GENERAL it is necessary to criticize them in detail, because after the long  
P. examination of them we have had, with the assistance of the  
PONTYPRIDD very powerful and elaborate arguments of counsel on both sides,  
URBAN it seems to me that there is no point in controversy as a matter  
COUNCIL. of law with regard to the principle applicable to this case. If  
Collins M.R. you once find the powers under which a public authority are  
acting and by which they are bound, it is common ground that  
if the thing done is outside those powers, fairly interpreted, it is  
ultra vires.

We have had quite a number of decisions quoted to us where, upon the particular facts, the Court came to the conclusion, one way or the other, whether the particular thing which was sought to be done under the particular powers was inside or outside. But the principle underlying all those cases has been affirmed over and over again—that is, that where you are dealing with a statutory body like this you have to see what the powers are which are conferred by the statute and then to come to the conclusion whether the thing done is fairly within their powers, either in actual terms or by reasonable implication therefrom, or whether it is outside those powers. If it is outside them, it is of course ultra vires and ought to be restrained.

In my opinion the learned judge was right in his views, both on the facts and on the law, and this appeal must be dismissed.

ROMER L.J. I am sorry for some reasons to be obliged to come to the conclusion to which I do, but I find myself unable to differ from Farwell J. in the conclusion at which he has arrived.

The case appears to me to turn substantially upon certain questions of fact. The first question is, under what power did the defendant council acquire the land in question in this action? I can only say that, upon the evidence as a whole, I think the land was acquired in exercise only of the powers given to the defendants by the Pontypridd Provisional Order, confirmed by the Act dated July 26, 1901, and by the statutes by virtue of which that order was made. In particular it appears to me that



the land was not acquired, nor was any part of it acquired, in order to comply with the provisions of the Public Health Act so as to enable the defendants to discharge their duty as to the collection and removal of refuse. In my opinion the land was not, on the evidence, nor was any part of it, acquired by the exercise of any power which the defendants had by virtue of s. 175 of the Public Health Act.

Now that being so, I need not consider whether the land could validly have been acquired as a whole by virtue, so to speak, of an exercise of the joint powers conferred by the provisional order as to electricity, and by s. 175 of the Public Health Act as to the removal and disposal of refuse. I leave the question open, only saying that it is by no means clear that a body like the defendants could acquire land as a whole, partly for one purpose and partly for the other, without distinguishing what part or how much land was acquired for the one purpose and under the one power, and how much land or what part of it was acquired for the other purpose and under the other power.

Having come to the conclusion on the first question of fact that the land was acquired under the provisional order, and not under s. 175 of the Public Health Act, then it is clear that the land was acquired for certain restricted purposes. Those purposes are defined by s. 10 of the Electric Lighting Act, 1882, one of the Acts in pursuance of which the provisional order was made. That section shews that the power given to the defendant council for the purposes of obtaining electric supply is limited, and that the land must be acquired as is stated for the purposes of supplying electricity; and, although the land cannot be used for any foreign purpose, of course I include within the purpose of supplying electricity the doing of such acts or things as may be necessary and incidental to such supply following the last words of the section.

That being so, before proceeding to the next question of fact I may point out that the whole mistake of the defendants seems to have arisen in this way: they appear to have thought that they could acquire this land under and by virtue of a power given to them by the provisional order for the purposes of the supply of electricity, and yet, having so acquired the land, could utilize

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part of it for another purpose ; and they appear to have thought that both before and after they acquired the land, for they do appear from a very early period to have thought of a plan by which they could utilize the land for what is called more than one scheme—that is to say, first, for the purposes of the supply of electricity, and secondly, for the purpose of enabling them to discharge their duty in the removal and disposal of refuse. It is that error of the defendants which appears to me to have led them into the trouble that they are in.

But this question now arises : seeing that they have bought this land for the purposes of the Electric Lighting Acts, is the purpose for which they are now going to use part of the land justified by the Acts by virtue of which they acquired the land ? In other words, is that part of the land which is about to be used for the erection and user of what has been called the refuse destructor going to be used substantially for the purposes of the electricity, using a short expression ? Clearly it is not strictly connected with the supply of electricity. The only question is whether the purposes of the erection of this large building, this refuse destructor, and the use to which it is going to be put are purposes so connected with and incidental to the main purpose of the generation and supply of electricity as to constitute an authorized user of that part of the land. I regret to say that, on the evidence as a whole, I come to the conclusion that it is not so connected with or incidental to the purpose of the supply of electricity.

Really a destructor such as this is was not wanted for the purpose of the supply of electricity at all. It was wanted for the purpose of disposal of the refuse, and was wanted by the defendants for that purpose in order to enable them to comply with the duties imposed upon them under the Public Health Act. The only connection between the erection and use of the destructor for the purposes of the destruction of refuse and the supply of electricity is this : that, seeing the use of the destructor of necessity gives rise to certain heat, use is made of that heat, which is one of the many results necessarily flowing from the use of the destructor, for the purpose so far of helping the generation of electricity. But as a matter of substance the

destructor was not erected for the purpose of obtaining that heat; it was erected, as I have said, to comply with the obligations of the Public Health Act, and the heat was merely one of the necessary outcomes of that compliance with the Act. This is also shewn by the very magnitude of the building proposed to be erected, and by the proceedings taken by the defendants for the purpose of borrowing money to defray the expense of it. They sought, and as I say, having regard to its nature and purpose, properly sought, to defray the expense of it as a separate work erected to comply with the provisions of the Public Health Act, and not as a work done for the purpose of the supply of electricity. They purported to defray the expense by borrowing money for it, as I have pointed out, as a purpose distinct from the purpose of the supply of electricity.

Taking all the circumstances into consideration, I cannot say that this proposed user of the land for the erection and use of this destructor can be properly regarded, taken as a whole, as being so incidental to or connected with the main purpose of the generating and supply of electricity as to form a justifiable user of the land acquired in the manner I have mentioned.

That being so, it appears to me that in substance the judgment of Farwell J. is quite right. But, for the reason which I am about to give, I think it will be advisable, without making any difference upon any question of costs, that some alteration in form in the wording of the order should be made. The view I take (and, as I gather, it is the view taken by the Master of the Rolls) with regard to this work is taken by considering it as a work proposed under the scheme as it stands. Of course, it is not for us to say what alterations may or may not be made with regard to any erection on this land, which may possibly be justified having regard to the purpose for which the land was acquired. It may be—I do not say more—that the council could make some erection which would be obviously ancillary to the main purpose of the generation of electricity, and it might not be the less so because it is used, temporarily or otherwise, for the consumption, under some circumstances, of refuse. Therefore I think it would be perhaps better, instead of granting the injunction in the form in which it is granted in the judgment appealed from, to make the order

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C. A. in this form :—Declare that the user by the defendants of part of  
 1906 the land purchased for the erection, working, and use of the  
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 GENERAL defendants is outside their power of using and dealing with  
 ? the land and ought to be restrained; and then let the injunction  
 PONTYPRIDD run generally as an injunction to restrain the defendants  
 URBAN from using the land except for the purpose of supplying electricity  
 COUNCIL. and doing all such acts and things as may be necessary and  
 incidental to such supply, following the words of s. 10.  
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COZENS-HARDY L.J. I am of the same opinion, and for the same reasons. I do not think I need add anything.

Solicitors: *Freshfields; Sharpe, Parker & Co., agents for J. Colenso Jones, Pontypridd.*

J. R. B.

# GODDEN v. HYTHE BURIAL BOARD.

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[1906 G. 606.]

KEKEWICH

J.

April 30.

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June 12.

*Burial Acts*—Ground “not already used as or appropriated for” a Cemetery—*Burial within 100 yards of Dwelling-house*—*Dwelling-house erected subsequent to Acquisition of Site for Cemetery*—“Already”—“Used for Burials”—*Injunction*—*Burial Act, 1855* (18 & 19 Vict. c. 128), s. 9.

The words in s. 9 of the Burial Act, 1855, “no ground not already used as or appropriated for a cemetery” mean, “used as or appropriated” at the date of the passing of the Act, and, consequently, the owner, lessee, or occupier of a dwelling-house which has been erected subsequently to the acquisition of a site for a cemetery by a burial board is entitled to an injunction to restrain any ground within 100 yards of such dwelling-house from being “used for burials” without his consent in writing.

Decision of Kekewich J. affirmed.

## MOTION.

This was an application for an interim injunction which raised a question of the construction of the proviso at the end of s. 9 of the Burial Act, 1855 (1), the point being as to the right to use

(1) Sect. 9 of the Burial Act, the said Act of the fifteenth and sixteenth years of Her Majesty as enacts



ground acquired for a cemetery for burials within 100 yards of a dwelling-house. The facts were shortly as follows:—

The defendants, the burial board for Hythe, found it necessary in the year 1905 to provide a new burial ground, as the existing one was nearly full.

On April 7, 1905, the defendants were authorized, by a resolution duly passed at a special vestry meeting, to acquire a certain site for the purposes of a burial ground. At this time there was only one house within 100 yards of the proposed site, and the owner and occupier of this house had given the requisite consent in writing to the user of the land as a burial ground.

The plaintiff was the owner of seven acres of land adjoining the proposed site, which he intended eventually to develop for building purposes but was then using as a market garden, and, after learning of the proposed purchase by the defendants, he on April 17, 1905, commenced to build two dwelling-houses on this land.

On April 26, 1905, the defendants, having obtained the consent of the Local Government Board and the Treasury, completed the purchase of the new burial ground, and at this time some of the walls of the plaintiff's houses were about six feet in height; on the following day the defendants caused the body of a pauper to be buried within eighty yards of the plaintiff's two houses then in course of erection, with a view to shew that they had fully appropriated the land in question for burial prior to any dwelling-house having been erected by the plaintiff.

The plaintiff had never consented to the acquisition by the defendants of the site in question, or to the user of any part thereof within 100 yards of his property for the purpose of burials.

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that 'no ground (not already used as or appropriated for a cemetery) shall be appropriated as a burial ground or as an addition to a burial ground under that Act nearer than two hundred yards to any dwelling house, without the consent in writing of the owner, lessee, and occupier of such dwelling house,' shall be repealed; but no ground not already used as or appropriated for a cemetery shall be used for burials under the said Act or this Act, or either of them, within the distance of one hundred yards from any dwelling house, without such consent as aforesaid."

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The plaintiff's houses were subsequently completed, and one was now occupied.

On March 24, 1906, another burial took place within eighty yards of the plaintiff's dwelling-houses. The plaintiff thereupon commenced the present action against the defendants, and served a notice of motion on them for an interim injunction to restrain the defendants from using for burial any part of their new burial ground within 100 yards of any of the plaintiff's dwelling-houses.

The motion was heard before Kekewich J. on April 30, 1906.

*Macmorran, K.C.*; and *P. Wheeler*, for the plaintiff. The words in s. 9 of the Burial Act, 1855, "not already used as or appropriated for a cemetery," mean not so used or appropriated at the passing of the Act. The word "already" has been judicially construed in *Apothecaries Co. v. Roby* (1), where it was held to relate to a date specially fixed by the particular Act in question; and in *Rolfe v. Perry* (2), where the words "a will already made" in the Real Estate Charges Act, 1854 (Locke King's Act), were held to apply to a will made when the Act received the royal assent.

The repealed proviso in s. 25 of the Burial Act, 1852, prohibited the appropriation within 200 yards of a dwelling-house; s. 9 of the Burial Act, 1855, prohibited the use within 100 yards of any dwelling-house. The object of the Legislature in thus fixing a limit was to promote public health and protect land-owners against nuisance: per Sir George Jessel M.R. in *Lord Cowley v. Byas* (3); and the protection relates to all burial grounds, whether public or private: *Greenwood v. Wadsworth*. (4) It does not matter when the dwelling-house is built; so soon as it is completed it sterilizes so much of the burial ground as is within the prescribed area, and to make provision against this burial boards have to purchase a neutral zone.

*P. O. Lawrence, K.C.*, and *Gatey*, for the defendant board. If the plaintiff's contention is correct, there will have to be a neutral zone around all cemeteries not appropriated or used as such before the Act of 1855, and that will have the absurd result

(1) (1822) 5 B. & Al. 949.

(2) (1863) 3 D. J. & S. 481.

(3) (1877) 5 Ch. D. 944, 952.

(4) (1873) L. R. 16 Eq. 288, 293.

of compelling every burial board to waste public money in purchasing twelve acres in order that they may get one acre for burial purposes. There is no hard and fast period of time fixed by the Burial Act, 1855, for the appropriation or user, and it is inconceivable that "already" means "at the passing of the Act." There must of necessity be, so to speak, a sliding time applicable to each case. The proviso in s. 25 of the earlier Act enacted in effect that no fresh ground should be appropriated as a burial ground nearer than 200 yards to any dwelling-house without the consent in writing of the owner, lessee, and occupier of such dwelling-house. That of itself presupposes a dwelling-house in existence and in a completed condition at the time of the contemplated appropriation. It cannot mean any dwelling-house whensoever erected. To say that it does, and to read "already" as meaning "at the passing of the Act," would make the proviso absurd. "Already used as or appropriated for" must have the same meaning in both Acts, and must refer, not to a definite fixed time such as the passing of the Act, but either to the time of the appropriation or user in each individual case, or to the time of the completion of the dwelling-house. In this case the house was built after the land had been acquired for the purposes of a burial ground, and we submit that the ground was appropriated and used as a burial ground before there was any dwelling-house within the prescribed limit. The plaintiff knew all along the purposes for which this ground was being acquired, but he stood by and did not attend the meetings and raise any objection.

KEKEWICH J. The first point to consider is what is the proper meaning of the word "already" as used in the Burial Act, 1855. I agree that it is quite fair to refer to the former Act, not only because it is enacted in *pari materia* and the same word is used, but also because this later Act is a modification, by repeal and re-enactment, of the former Act. It is quite right to urge, and it is a fair argument, that the two Acts must be read together. I see no reason to doubt that "already" means the same thing in both Acts, and I am unable to follow the argument that that makes the former Act absurd. I do not see why it makes the

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former Act more absurd than the latter, and I do not see any reason why the latter Act is rendered absurd by reading "already" as the plaintiff says it ought to be read.

We are not dealing with a technical word, but with a word in common use in the English language, and it is one which has no technical meaning whatever. The rule in such cases is to construe the word according to its popular and colloquial meaning. What is the meaning of the word "already" in the popular or colloquial sense? It means "at this time" or "now." Reading the Act through, it reads thus: "No ground not now used as or appropriated for a cemetery." That "now" can only mean, it seems to me, at the date of the passing of the Act. There is no "now" with reference to an Act of Parliament except the date when it receives the royal assent. There might possibly be an exception where the coming into operation of the Act is deferred; but, as at present advised, I do not think even that would alter it. "Now," it seems to me, points to the date when the Act in which the word is used becomes an Act, that is, when it receives the royal assent. I see nothing in the authorities which have been cited to make me think that that is otherwise than perfectly correct. The point is not decided, but the authorities, I think, point to that conclusion.

Then, if that be so, there is no doubt that in the present case this ground was not, at the date of the passing of the Act, already used as or appropriated for a cemetery, and the rest of the language has to be considered on that footing. The case of *Lord Cowley v. Byas* (1) is not, of course, strictly in point, but the judgment of Sir George Jessel M.R. in the Court of Appeal is extremely instructive as shewing what the intention of the Legislature must be taken to have been. It seems to me important to call attention to what he considers the frame of the Act. He says that the Legislature must be taken to have said, "All the protection you want is a protection against nuisance; if so much of the cemetery as is within 100 yards of your house is laid out as a park, or garden, or a chapel, or for some other purpose of that kind, and not for actual burials, we do not intend to give you the right to prohibit its being so used because

(1) 5 Ch. D. 944, 952.



such use does not hurt you." He is there directing particular attention to the words "used for burials" which occur in the Act of 1854, but do not occur in the former Act, shewing that the later Act was intended to be a considerable alteration of the provisions of the former, as no doubt it was. That seems to me to be the purview of the Act; and, unless the plaintiff is in some way excluded by his own conduct or by extraneous facts, he is entitled to say, "However else you may use this for the purposes of your board, you shall not use it for burials within 100 yards of my dwelling-house."

It was suggested, rather than argued, that the plaintiff had stood by, that it was necessary to summon meetings and get consents, and that he might have attended those meetings and have objected, and he did not. It was only suggested, it was not argued; and it is quite clear to my mind that he could not be precluded from insisting upon his statutory right merely by standing by in that way, if in fact he stood by.

A more important point, and one which has been seriously argued, is this: At the date of the acquisition by the board of this ground as a burial ground or cemetery the plaintiff had no dwelling-house anywhere near it. The plaintiff had land which could be called building land in a popular sense, that is to say, land on which buildings might hereafter be expected to be built, but it was not land upon which there was any building at the time, and he, seeing himself exposed to damage and thinking he might suffer damage, began to run up a house quickly. Mr. Macmorran has very properly not argued that the plaintiff was within the protection of the statute before he had a dwelling-house, and laying foundations or even putting something else on the ground would not suffice. But he has now a dwelling-house within 100 yards of a spot which the board desire to use for burials, that spot not being part of the ground used as or appropriated for a cemetery at the date of the passing of the Act.

The question, of course, arises whether the plaintiff is now entitled to the protection of the statute as regards the house he has built since the acquisition of the ground. The statute says nothing about the date of the acquisition of the ground; it only

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speaks of the ground "already used as or appropriated for a cemetery," and those words depend upon the meaning of the word "already" which I have dealt with. There is nothing there to indicate that any dwelling-house is to be beyond the protection. I see no reason why the plaintiff should not be protected because he had not a dwelling-house at the date of the acquisition of the cemetery. It may be put in two ways. As Sir George Jessel M.R. says in the case to which I have already referred, the Legislature must be taken to have enacted protection against a nuisance. If that be so, and if the plaintiff is suing in respect of a nuisance, it is no answer to him to say that he has come to the nuisance. He is entitled to complain of the nuisance, though it is not a nuisance except in the sense that the Legislature has recognized, that is to say, as being something against which a householder is to be protected. The facts will not admit, really, of that statement of the case. The sounder and the stronger way of putting it is that the plaintiff is the owner of a dwelling-house which the Legislature has protected, and he is entitled to insist upon his statutory right. It is for the Legislature to amend the Act, if necessary, and to say that as it stands this enactment sterilizes burial grounds and may render them useless, notwithstanding the large expenditure and the provisions which have been made for burial grounds. The plaintiff has nothing to do with that. He is entitled, it seems to me, to insist upon the protection which the enactment as it stands gives him, and to say, "What I consider a nuisance, that is, the use of this ground for actual burials, shall not continue within 100 yards of my dwelling-house."

I think the plaintiff is entitled to the injunction for which he asks.

R. M.

C. A. The defendants appealed. The appeal was heard on June 12, 1906.

*Cripps, K.C., P. O. Lawrence, K.C., and Gatey*, for the appellants. Assuming that the word "already" refers to the date of the Act, so far as appropriation is concerned, still the time to consider whether the user is made within the prohibited limit is the

time when the ground is first used for cemetery purposes. In this case, at the time of the first burial there was no house within the prescribed limit whose occupier and owner had not consented. If the ground is once used for burials with the consent of the persons then within the prescribed limit, the right to continue to bury is not lost by the subsequent erection of a dwelling-house; the right to use the ground for burials, having thus once attached, is not defeasible by the subsequent erection of a dwelling-house within the prescribed limit. Unless some such construction is put upon this section the results to burial boards will be disastrous and produce a state of things never contemplated by the Legislature. It would enable one man to sterilize half a cemetery, acquired at great expense out of public moneys. This is not a question of public health or of nuisance, it is a mere question of construction; the common-sense view of "already" must be when the question of the particular burial arises. When the plaintiff's dwelling-house was completed this ground had already been "appropriated and used" for burials.

[*Lord Cowley v. Byas* (1) was referred to.]

*Levett, K.C.*, and *P. Wheeler*, for the respondent. The Burial Act of 1852 allowed appropriation of ground with certain restrictions, but, once appropriated, the use of it for burials could not be interfered with. By the Burial Act of 1855 this state of the law was altered. Appropriation was made easier, but restriction was placed on the user within certain limits without consent.

[They were stopped.]

VAUGHAN WILLIAMS L.J. The results of what we are compelled to decide on the construction of the Act of 1855 are certainly rather alarming, and the decision will practically result in this: that if a burial board, which has the duty cast upon it of providing a burial ground, provides it, and if the burial ground is in a place where a large burial-ground is not wanted, it will have, in order honestly to raise money for the purposes of making the burial ground, to purchase a very large margin of land all round the burial ground in order to enable the ground

(1) 5 Ch. D. 944, 952.

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when purchased to be used for the purposes for which it was acquired. As an instance of this, a plan was put before us shewing that in a case, which is not a very extreme case, of having to make a burial ground of one acre, the board would have to purchase a margin of twelve acres, on which it follows that no house could be built at all; because, if the burial board themselves were to build a house and to let it, the occupier for the time being might practically get an injunction putting an end to the use of the whole of that cemetery. I do not believe that the Act of Parliament could really have intended such a result. It seems to me that it will work a great hardship, not only on the locality which has to provide the burial ground, but on the unfortunate people who have lent money with the sanction of the Local Government Board. I have, therefore, looked myself most anxiously at the 9th section to see whether there is any way of getting out of this construction; but the hope that one might have in reading through this particular s. 9 for the first time is certainly not assisted or encouraged by the judgment of Sir George Jessel in the case of *Lord Cowley v. Byas*. (1)

I am afraid, therefore, that this appeal must be dismissed, and dismissed with costs.

ROMER L.J. I am of the same opinion. I do not mind confessing that I have struggled, during the argument, to see whether some construction could not be put upon this section which would support the contention of the appellants, for it appeared to me that otherwise the effect of the Act would be something which could not have been contemplated by the Legislature. All I can say is that s. 9 of the Act is too strong for me, and I think it must have the effect which has been given to it in this case by the learned judge in the Court below.

In the first place, I must come to the conclusion, on several grounds, that the word "already" as used in s. 9 means at the time of the coming into operation of the Act, and is not a word used with reference to the time of user for burials at all. I come to that conclusion not only because the expression "not already used as or appropriated for a cemetery" is the exact expression

(1) 5 Ch. D. 944, 952.



used in the earlier Act, where clearly the word “already” was referring to the time of the passing of that Act, but because otherwise, if I used the word “already” as applied to the appropriation, it would lead to consequences which would be practically ludicrous. There is nothing in this section to prevent any appropriation of land for the cemetery at all. All that is prohibited is user for burials within a distance of 100 yards from any dwelling-house.

Having come to that conclusion as to the meaning of the word “already,” I have to consider only what does “ground” mean. It says “no ground within a distance of 100 yards from a dwelling-house.” I suppose that it means what it says, and I cannot do otherwise than give effect to it. And “dwelling-house” means what it says. It means any dwelling-house in existence at the time you have to consider the question whether a cemetery is being used for burials or not.

As I have said, it appears to me impossible to give to this section the construction which is contended for by the appellants in the present case, whatever the consequences of that may be, and I think, therefore, that the appeal fails.

FLETCHER MOULTON L.J. I am of the same opinion.

Solicitors: *White, Borrett & Co., for G. S. Wilks, Hythe; Kingsford, Dorman & Co., for Kingsford & Drake, Hythe.*

W. C. D.

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June 12, 13.

*In re* GIST.GIST *v.* TIMBRILL.

[1905 G. 876.]

*Administration—Personal Estate—Intestacy—Lunatic—Advances to Brothers and Sisters—Stipulation as to Hotchpot—Deceased Sister's Children taking by Representation—Statute of Distribution (22 & 23 Car. 2, c. 10), ss. 6, 7.*

A bachelor lunatic died intestate leaving a brother, a sister, and the children of a deceased sister his sole next-of-kin.

The deceased sister had received an advance from the lunatic's property under an order of the Lunacy Court, which order, with her consent, directed that the advance should be taken and considered as part of any share to which she might become entitled in the lunatic's estate at the time of his decease in the event of her surviving him :—

*Held* (affirming the decision of Swinfen Eady J., [1906] 1 Ch. 58), that the deceased sister's children were not bound to bring the advance into hotchpot.

APPEAL from the decision of Swinfen Eady J. (1)

Samuel Gist, a bachelor, was found a lunatic on August 4, 1852. The sum of 3500*l.* a year was allowed by the Court for his maintenance, but as his income largely exceeded that amount, certain allowances were subsequently made to his brother Henry and his sisters Marianne and Ann for their maintenance and support.

At the time these allowances were made the presumptive next-of-kin of the lunatic were his brother Henry and his sisters Marianne, Ann, and Elizabeth. Henry was also his heir-presumptive.

By an interim order in lunacy, dated March 21, 1874, and made on Henry's application for a yearly allowance of 500*l.*, it was ordered that the sum of 200*l.* be allowed out of the lunatic's income to Henry for his immediate requirements, and further directions were reserved until the Master had made a report as to the lunatic's income.

By a second order, dated March 21, 1874, and made on

(1) [1906] 1 Ch. 58.

Marianne's application, she and her husband consenting that the sums which should be advanced to her from time to time pursuant to this order should be taken and considered as part of any share to which she might become entitled of and in the estate of the said lunatic at the time of his decease in the event of her surviving him, it was ordered that until further order the sum of 300*l.* per annum be allowed out of the lunatic's income as from March 4, 1874, to Marianne for her maintenance and support, and also the sum of 100*l.* in addition for her immediate requirements, and it was ordered that the sums which should be so advanced be taken and considered as part of any share to which Marianne might become entitled of and in the estate of the said lunatic at the time of his decease in the event of her surviving him.

By a third order, dated January 30, 1875, and made on Henry's application, the sum of 500*l.* per annum from March 21, 1874, was allowed to Henry on similar conditions as to accounting.

By a fourth order, dated March 10, 1877, and made on Ann's application, the sum of 300*l.* per annum from March 21, 1874, was allowed to Ann on similar conditions as to accounting.

Owing to the diminution of the lunatic's income it became necessary to reduce the various allowances.

By a fifth order, dated April 1, 1882, and made on the application of the committee of the estate in the presence of the brother and three sisters, it was ordered that as from March 25, 1882, the following annual sums be allowed for the maintenance of the lunatic and the members of his family in substitution for the several allowances ordered to be made hitherto for that purpose, viz., 2750*l.* per annum to the lunatic, 235*l.* per annum to Marianne, 395*l.* per annum to Henry, and 235*l.* per annum to Ann.

By subsequent orders of June 3, 1886, and March 14, 1894, made on the application of the committee in the presence of the brother and three sisters, the various allowances were further reduced.

The last three orders contained no direction that the reduced allowances to the brother and two sisters should be taken and considered as part of their shares of the lunatic's estate.

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Marianne died on March 15, 1895, leaving three children, Mary, Emily, and Eleanor, all of whom were now of age. They had not received any allowance. The lunatic's sister Elizabeth died a spinster on January 9, 1896.

The lunatic died a bachelor and intestate on August 19, 1904, leaving his brother Henry, his sister Ann, and his nieces Mary, Emily, and Eleanor his next-of-kin.

On September 3, 1904, Henry took out letters of administration to the lunatic's estate.

Upon a summons issued to determine (inter alia) whether the nieces must bring their mother's advances into account, Swinfen Eady J. held that they were not bound to do so. (1)

From that decision the sister Ann appealed.

*Micklem, K.C.*, and *Johnston Edwards*, for the appellant.

*Younger, K.C.*, and *J. K. Young*, for the lunatic's brother, supported the appeal.

*Eve, K.C.*, and *H. B. Howard*, for the nieces, were not called upon.

VAUGHAN WILLIAMS L.J. Counsel for the appellant have been obliged to admit that there are no provisions in the Statute of Distribution as to hotchpot with reference to brothers and sisters, and that consequently they cannot succeed in this appeal by relying on the statute alone. That, therefore, reduces the question for decision to a mere matter of the construction of the lunacy order of March 21, 1874. That order does not contain any words which entitle the appellant to succeed. Under it the advances were to be brought into account in the event of Marianne's surviving the lunatic, which did not happen. The appeal, therefore, fails and must be dismissed.

ROMER L.J. and FLETCHER MOULTON L.J. concurred.

Solicitors: *Routh, Stacey & Castle*, for *Stapleton & Son, Stamford*; *Belfrage & Co.*; *Bloxam, Ellison & Co.*, for *Bryan & Helps, Gloucester*.

(1) [1906] 1 Ch. 58.

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WHITEHOUSE *v.* HUGH.

[1905 W. 174.]

C. A.

1906

July 3, 4.

*Building Scheme—Plan—Implied Representation—Power to Vary—Blocking up Road—Cul-de-sac—Dedication to Public—User.*

The plaintiff was the owner of a house built on a plot which formed part of an estate laid out by a building society in accordance with a scheme. On the sale of this plot by the society to the plaintiff's predecessor in title it was shewn on a plan of the estate as bounded on one side by a vacant space, which, though not named in the plan as a road, had been in fact roughly made up by the society as a road. This road ran from a street on which the plaintiff's house fronted to a level crossing on a railway over which there was a private right of way for the benefit of the owners of a field on the opposite side of the line. The building society having acquired the field and released the right of way, fenced off the road and sold the site to the defendant's predecessor in title. All the plots on the building estate were conveyed subject to a condition reserving to the building society the power of allowing a variation of the plans and conditions. In an action to restrain the defendant from digging up the road on the ground, first, that it was a violation of the building scheme; and, secondly, that the road had been dedicated to the public by user:—

*Held*, that under the conditions the society had an absolute power to alter the building scheme by closing the road, and that there was no sufficient evidence of user or dedication to entitle the plaintiff to succeed.

Decision of Kekewich J., [1906] 1 Ch. 253, affirmed.

*Per Romer, L.J.*: It is very difficult to make out dedication by user where the road, so far as the public are concerned, is a cul-de-sac.

APPEAL from the decision of Kekewich J. (1)

The action was for an injunction to restrain the defendant from building upon a roadway adjoining the plaintiff's premises, in contravention of a building scheme adopted by the Birkbeck Freehold Land Society in 1875.

In 1885 the plaintiff purchased the premises from C. S. Chamberlayne. They consisted of a house and garden, now known as No. 19, Mackenzie Road, Beckenham. The house fronted on Mackenzie Road, and was bounded on one side by the roadway in question, which led from Mackenzie Road to a level crossing

(1) [1906] 1 Ch. 253,

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on a railway, over which there was at one time a private right of way for the benefit of the owners of a field on the opposite side of the railway. The plaintiff's premises formed part of a building estate laid out by the Birkbeck Freehold Land Society, and represented plot 352 and part of plot 351 upon a plan incorporated in the common form of conveyance used by the society in dealing with the estate. This plan shewed the roadway as a vacant space between plot 352 and plot 355, extending from Mackenzie Road to the railway, but it was not named on the plan as a road.

Chamberlayne had purchased the plaintiff's property as a building site in 1878, under a conveyance which was expressed to be made subject to the following, among other conditions: "9. The vendors reserve to themselves the power of allowing a variation of the plans and conditions."

The roadway in question had been roughly made up by the building society in 1873, but had never been metalled. In 1897 the building society, having previously acquired the field on the other side of the railway and released the company from maintaining the level crossing, fenced off the roadway from Mackenzie Road and conveyed the site of it to the defendant's predecessor in title. In 1904 the defendant commenced to dig up the roadway for the purpose of building on the site, and the plaintiff then brought this action to restrain him from doing so.

The plaintiff alleged, first, that the building scheme was binding on the society and on all persons claiming through them, and that it was part of the scheme that the roadway shewn on the plan should always remain a roadway; and, secondly, that the roadway had been dedicated by the society to the use of the public.

The facts are more fully stated in the report in the Court below. (1)

Kekewich J. held—(1.) that there was no representation to purchasers under the building scheme that the vacant space shewn on the plan should always remain vacant; (2.) that, having regard to the 9th condition, the plan was not binding on the society; and (3.) that there was no sufficient evidence of user or dedication

to entitle the plaintiff to succeed. He therefore dismissed the action.

From this decision the plaintiff appealed.

*Ernest Todd*, for the appellant. The plaintiff acquired his house on the faith of the building scheme remaining unaltered, and, apart from the power to vary, the land society and those claiming under them cannot block up this roadway to the detriment of the plaintiff: *Spicer v. Martin*. (1) The power reserved to the land society to allow variations does not extend to the blocking up of the roads shewn on the plan, but was intended only to cover minor alterations, such as the number of houses to be built on a plot, and so forth. The plan of the building scheme contains an implied representation, on which the plaintiff was entitled to rely, that this vacant space was and would remain a roadway: *Peacock v. Penson*. (2)

Further, there was a dedication to the public of this roadway, and the plaintiff has suffered special damage by the blocking up of the roadway. There was a user in fact by the public of this roadway and level crossing extending over a great many years, and from that user dedication ought to be inferred. It is no objection to dedication that the roadway was originally intended for private use: *Rex v. Lloyd*. (3)

[VAUGHAN WILLIAMS L.J. That means for the convenience of the owner of the soil. This particular road was made for the purpose of giving a person who was not the owner of the soil an easement.

ROMER L.J. It is very difficult to make out dedication by user where, as in this case, the road, so far as the public are concerned, is a cul-de-sac.]

Here there is evidence of express dedication. In 1893 the land society, having another building estate on the other side of the railway, continued this roadway across the railway for the purpose of connecting their two estates, and that must have been with the intention that the roadway on either side should be used by the public. From the acts of the land society and of the

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(1) (1888) 14 App. Cas. 12.

(2) (1848) 11 Beav. 355.

(3) (1808) 1 Camp. 260.

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railway company the public were justified in believing that they had the right, which they in fact exercised, of using the whole of this roadway and the level crossing, and when once a roadway has been dedicated to the public it cannot be closed at the will of the original owner. If a man opens his land so that the public pass over it continually a very few years' user will constitute a dedication: *British Museum Trustees v. Finnis* (1); *Grand Surrey Canal Co. v. Hall* (2); *Barraclough v. Johnson*. (3)

The dictum of Farwell J. in *Attorney-General v. Antrobus* (4) does not affect this case. There is not only user here; the roadway was made up by the society. Assuming that there was dedication to the public, the plaintiff has suffered special damage, and is entitled to maintain this action without the presence of the Attorney-General.

*P. O. Lawrence, K.C.*, and *Cozens-Hardy*, for the respondent, were not called upon.

VAUGHAN WILLIAMS L.J. This case has been argued at considerable, but I do not think unnecessary, length, because it is a case of great importance to the appellant, and also one which raises difficult questions both of fact and law, but I think that the decision appealed from was quite right. I may say generally that the appellant has based his case on three grounds. First, upon the plans; and he relied upon the plans as shewing that there was a road, and as making such a representation to those who came to purchase plots that those who put forward the plans could not go back from them. The answer to that contention is that that might have been true if it had not been for the fact that the 9th condition, subject to which the appellant took his conveyance, gave the society an absolute power to alter the scheme by closing the road in question. I am not sure whether that condition gave the society power to make any alteration in the scheme which they pleased, such as what counsel for the appellant, in the course of his argument, called a radical alteration, but it is clear that at any rate it covers the closing of this road. The next point is as to user. On this I agree with the result

(1) (1833) 5 C. & P. 460.

(2) (1840) 1 Man. & G. 392.

(3) (1838) 8 Ad. & E. 99.

(4) [1905] 2 Ch. 188, 206.



arrived at by Kekewich J. It is not necessary for me to go through the learned judge's summary of the evidence on this point, which is set out on p. 263 of the report in [1906] 1 Ch., and appears to me to be absolutely right. The only remaining point is as to dedication. I agree that if you take the evidence given by the secretary of the building society alone it would appear that the society, in dealing with this estate, did do some things which were evidence of dedication. But there are two answers to that. One is that all that is only some evidence of dedication. If there had been really any dedication, and dedication of the sort suggested, it would have affected an enormous number of people. The road has been blocked up; but neither the authorities who represent the public interest in roads have raised any objection, nor has anyone else except the appellant, and it is clear that no one regarded the society's acts as a dedication. It is also clear, when one looks through the pleadings in the action, that this suggested dedication by the acts of the society was somewhat of an afterthought. The appeal has been well argued, but it must be dismissed.

ROMER and FLETCHER MOULTON L.JJ. concurred.

Solicitors: *Wynne Evans; Rubinstein & Co.*

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April 24, 26.

*In re* WRIGHT.WHITWORTH *v.* WRIGHT.

[1906 W. 370.]

*Settlement—Power—Appointment—Perpetuity—Election.*

Under two settlements made in 1871, and another made in 1882, W. had testamentary powers of appointment over the settled funds amongst her issue, her children taking in default of appointment. She had also unsettled property of her own. All the children were born after 1871 and before 1882.

By her will W. gave both the settled and the unsettled properties to trustees upon trusts in favour of her son and her three daughters, part of the son's share being payable to him at the age of twenty-five years, and the share of each daughter being given in trust for her for life with remainder to her children:—

*Held*, that as the gifts to the son at twenty-five and to the grandchildren were, in respect of the property settled in 1871, void as infringing the rule against perpetuities, the children of W. were not bound to elect between what was invalidly appointed to them and the interests validly given to them by the will.

*In re Oliver's Settlement*, [1905] 1 Ch. 191; and *In re Beales' Settlement*, [1905] 1 Ch. 256, followed.

*In re Bradshaw*, [1902] 1 Ch. 436, not followed.

By a settlement dated April 11, 1871, reciting certain family arrangements under which it had been agreed that Mary Whitworth, spinster, was entitled to a certain share of the property given by the will of her late father, a part of this share was settled upon trust to pay the income to Mary Whitworth for life (during coverture for her separate use without power to anticipate the same), and after her death, "in trust for the benefit of any child or children or other issue of the said Mary Whitworth (born in her lifetime) as she the said Mary Whitworth shall (notwithstanding coverture) at any time or times by deed or will appoint, and subject thereto, in trust for such child or children of the said Mary Whitworth as shall attain the age of twenty-one years, or being a daughter or daughters attain that age or marry, if more than one in equal shares."

By another settlement, dated April 24, 1871, Mary Whitworth

settled certain railway stock and cash upon trust to pay the income to herself for life for her separate use without power of anticipation, and after her death upon trust, if she should so by will direct, to pay all or any part of the income to any surviving husband during his life, and subject thereto, "upon trust to transfer the said trust fund unto or for the benefit of such children or child or other remoter issue of the said Mary Whitworth, and in such proportions and manner and at such times as the said Mary Whitworth (notwithstanding coverture) shall by deed or will appoint, and subject thereto upon trust to transfer the same unto such children or child of the said Mary Whitworth as shall attain the age of twenty-one years, or being a daughter, shall marry under that age with lawful consent, if more than one, in equal shares."

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On October 12, 1872, Mary Whitworth was married to John Hodgson Wright.

There were four children of the marriage (all born before September, 1882), namely, the defendants Ethel Wright, Hilda Wright, Francis Whitworth Wright, and Mary Evelyn Wilson (who had one child, the remaining defendant, Hilda Marian Wilson, who was born in 1904).

By a settlement, dated September 20, 1882, indorsed on the settlement of April 24, 1871, a sum of 2800*l.* railway stock was settled upon the same trusts as those contained in the "within-written indenture." There was not a hotchpot clause in any of the settlements. Mary Wright, widow, as she then was, died on August 29, 1905 (being then entitled to unsettled property of the value of over 40,000*l.*, in addition to her interests in the settled properties), having made a will, dated July 25, 1903.

By her will, after bequeathing certain chattels absolutely, she gave to her father-in-law, Henry Wright, an annuity of 100*l.* during his life, and gave all her real estate and the residue of her personal estate, and also all real and personal estate over which she might have a power of appointment by will, whether under any settlement, deed or will, to trustees, upon trust that they should out of the proceeds of sale thereof and with and out of her ready money pay her funeral and testamentary

BUCKLEY expenses and debts, and should appropriate and invest such a  
 J. sum of money as would when invested be sufficient, with the  
 1906 income to pay the annuity of 100*l.*, and should stand possessed  
 WRIGHT, of the residue of the proceeds of sale, and of the annuity fund  
*In re.* (subject to the annuity), upon trust as to 10,000*l.* (thereinafter  
 WHITWORTH called Francis Whitworth Wright Trust Fund, and below called  
 C. "Francis Wright's Fund") upon the trusts thereafter declared  
 WRIGHT. concerning the same, and as to the rest of the proceeds of sale  
 — and annuity fund upon trust for her said four children in equal  
 shares as tenants in common.

The will then continued as follows:—

"Provided always and I declare that my trustees shall stand possessed of" Francis Wright's fund "and the shares of my said son and daughters" (naming them) "of and in my residuary trust funds, Upon the trusts following, that is to say, as to the said" Francis Wright's fund "upon trust when my said son . . . shall attain the age of twenty-one years to pay the income thereof to my said son . . . until he attains the age of twenty-five years, and upon his attaining the age of twenty-five in trust to pay the income thereof to my said son . . . during his life, and from and after his decease upon trust for all his children, who being sons shall attain the age of twenty-one years, or being daughters shall attain that age or marry under that age in equal shares, and if there shall be only one such child then in trust for that one child. And in case my said son . . . shall not have any child who being a son shall attain the age of twenty-one years, or being a daughter shall attain that age or marry, my said son shall have power to appoint by will" a moiety of the income of Francis Wright's fund to his wife for life. "And subject thereto my trustees shall stand possessed of the said" Francis Wright's fund "and the investments hereof, Upon trust for all my other children in equal shares, the shares of my daughters to be held upon the same trusts as their original shares. And as to the share of my said son . . . of and in my residuary trust fund, Upon trust to pay the same to him upon his attaining the age of twenty-five years. And as to the shares of my said daughters" (naming the three) "of and in my residuary trust fund . . . Upon trust to pay the income of the



share of each of them . . . . to such daughter during her life” for her separate use without power of anticipation during coverture. “And from and after the decease of each of them my said daughters . . . . do and shall stand possessed of the share of each of them upon trusts for her children at twenty-one or marriage, equally.” And testatrix declared that in case there should be no such child, a daughter should have power to appoint by will a moiety of the income of her share to her husband for life, and that, subject thereto, the trustees should stand possessed of a daughter’s share in trust for “all my other children in equal shares the shares of my daughters to be held upon the same trusts as their original shares.”

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WHITWORTH  
v.  
WRIGHT.  
—

An originating summons was taken out by the surviving trustee of the three settlements and others against the four children and grandchild of Mary Whitworth, for the determination of the following questions and for the relief following:—

1. Whether the powers of appointment had been to any and what extent exercised by Mary Wright’s will.

2. Whether if and so far as such powers were so exercised, the children of Mary Wright became absolutely entitled to the trust funds, or for life only, and then whether any and which of the subsequent limitations were void for remoteness or otherwise, and who would be entitled to the trust funds respectively on their respective deaths.

3. Whether any case of election arose as against the children of Mary Wright, as between the settled funds respectively and the residue of her estate, so as to make it necessary for such children respectively to elect whether they would make good the purported settlements of the appointed funds respectively out of their respective shares of the testatrix’s estate, or whether they would retain their shares in the estate and give up the appointed funds, or vice versa.

4. Whether the sum of 10,000*l.* and share of residue given in trust for Francis Whitworth (who had attained the age of twenty-one years) were now payable to him absolutely, or whether the payment thereof must be postponed to any and what period, or whether he had only a life or other limited interest therein.

BUCKLEY J. *Gatey*, for the plaintiffs, stated the facts and the questions to be decided thereon.

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*Gerald Walker*, for the defendants other than Hilda Marian Wilson. It will be contended that, although the gifts by Mary Wright's will to the defendant Francis Whitworth at twenty-five, and to her grandchildren are void on the ground of remoteness, to the extent of the property comprised in the 1871 settlements of Mary Wright's property, the children of Mary Wright are put to their election whether they will adopt or acquiesce in the appointments purported to be made, or give up their shares in the other property given to them by the will. The decisions on this question are not consistent. The decision of Kekewich J. in *In re Bradshaw* (1) is in favour of the application of the doctrine of election; but Farwell J. in *In re Oliver's Settlement* (2), and Warrington J. in *In re Beales' Settlement* (3) have refused to follow the decision of Kekewich J., and have laid down what, it is submitted, is the right principle, that when the appointment fails by infringing the rule against perpetuities, those taking in default of appointment are not put to their election to take either their interests in the settled fund or their interests in the appointor's property given to them by the instrument which purports to appoint the settled fund.

*Wollaston v. King* (4), *In re Warren's Trusts* (5), and *In re Hancock's Trusts* (6), are also authorities against the contention that the doctrine of election applies to such a case as this.

*Gilbart-Smith*, for the defendant Hilda Marian Wilson, the infant grandchild of Mary Wright. Although the gifts to the grandchildren fail in respect of the settled property, the children of the testatrix are put to their election. A case in which a gift fails for remoteness stands on exactly the same footing as a gift in excess of a power. *Tomkyns v. Blane* (7) was not cited in *In re Warren's Trusts* (5), or in *In re Oliver's Settlement* (2), or in *In re Beales' Settlement* (3), and balances the authorities, leaving it open to the Court to adopt the principle laid down by

(1) [1902] 1 Ch. 436.

(2) [1905] 1 Ch. 191.

(3) [1905] 1 Ch. 256.

(4) (1869) L. R. 8 Eq. 165.

(5) (1884) 26 Ch. D. 208.

(6) (1889) 23 L. R. Ir. 34.

(7) (1860) 28 Beav. 422.

Romilly M.R., in *Tomkyns v. Blane* (1), that there is no moral obligation in the case either of an appointment in excess of a power or of a gift void for remoteness. Effect ought not to be given to an objection which is founded on technicality, and not on illegality of purpose.

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*Cur. adv. vult.*

April 26. BUCKLEY J. I deferred the delivery of my judgment in this case out of respect for Kekewich J., in order that I might consider with deliberation his judgment in *In re Bradshaw* (2), and look into the previous authorities upon the question. Having done so, I find myself unable to follow the learned judge's decision. I agree with the decision of Farwell J. in *In re Oliver's Settlement* (3), and with that of Warrington J. in *In re Beales' Settlement* (4). I concur in the reasoning and the conclusions of Farwell J. in *In re Oliver's Settlement*. (3)

By her will Mary Wright so exercised powers given to her by the settlements of April 11, 1871, and April 24, 1871, as to transgress the rule against perpetuities. As regards the property the subject of those powers, the gift to Francis Whitworth Wright, payable at twenty-five, and the interests given by Mary Wright to her grandchildren, are gifts in breach of the rule against perpetuities, and are void. But no case of election is raised by the will by reason of those gifts being void. This follows from what I have said above.

There remains for argument the question (supposing that under these circumstances the question arises) whether the consequence of the gifts being void is that the funds as to which the gift in the will fails go as in default of appointment, or whether the prior absolute gift in the will prevails. I reserved this question for argument if necessary. Mary Wright had properties other than those over which she had the above-mentioned powers—namely, property of her own and property hers by way of power under the settlement of 1882. At the date of the settlement of 1882 all her four children were lives in being. No question of perpetuity arises in respect of these two

(1) 28 Beav. 422.

(2) [1902] 1 Ch. 436.

(3) [1905] 1 Ch. 191.

(4) [1905] 1 Ch. 256.

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—

classes of property. By her will Mary Wright throws all her property, both that which was hers and that over which she had powers, into one fund, and out of the proceeds of conversion of that fund directs the payment of her funeral and testamentary expenses and debts, and an annuity of 100*l.* a year to her father-in-law, Henry Wright. These are gifts which could not come out of the property over which she had a power, and I think must be taken to have been given out of the property which was hers. She then gives the residue of the fund and the amount set apart to answer the annuity upon trusts for investment, and the trustees are to stand possessed as to 10,000*l.* upon certain trusts for her son Francis, and as to the residue upon trust for Francis and his three sisters in equal shares as tenants in common with certain further provisions for settling her children's shares. As regards some part of the property these trusts are good, and as regards other part they are bad as infringing the rule against perpetuities. For the purpose of determining the portion of the fund as to which the trusts are valid, and the portion as to which the trusts are invalid, I think a rateable proportion must be attributed to each, having regard to the values of the respective properties, and that this applies as much to the 10,000*l.* as to the residue. There is no gift of the 10,000*l.* as a separate legacy. It is a sum to be taken out of the general fund, and it must be taken rateably out of the property included in the settlements of 1871 and the other properties according to their respective values. The above, I think, furnishes the materials for answering all the questions in the summons, subject to the question upon which I said I would hear argument; but I wait first to hear whether counsel suggest that, having regard to this judgment, there is any further question.

As counsel agreed that no question remained for argument, his Lordship made a declaration that the trusts, as regarded the gifts to Francis Wright at twenty-five and to the grandchildren of the testatrix Mary Wright, were as regards the property included in the settlements of 1871, void for remoteness; that there was no case of election; and that a rateable proportion



must be taken as between the properties included in the settlements of 1871 and the other properties, and that the trusts failed or succeeded according to those rateable proportions.

Solicitors for all parties: *Walker & Rowe, for Frederick Walker & Son, Halifax.*

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WRIGHT.*In re* SEAGER HUNT.

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LIMITED v. HUNT.

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June 1.

[1904 H. 277.]

*Lunacy—Person not detained as or found of Unsound Mind, but incapable of managing his Affairs—Order for Payment of Debt in Priority—Subsequent Death of Debtor and Administration of his Estate in High Court—Effect of Lunacy Order—Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 116, 117.*

H. was a person not detained as or found lunatic, but found to be incapable of managing his affairs through mental infirmity arising from disease.

In 1898 a Master in lunacy made an order under s. 116 of the Lunacy Act, 1890, that H.'s wife should be authorized to do such things as the Masters should approve of for the purpose of protecting his estate and to exercise the powers of a committee of his estate.

In 1902 an order was made in lunacy that H.'s wife should apply certain funds in payment to his creditors of a dividend of 6*d.* in the pound on their debts.

In 1904 an order was made in lunacy that B. & Co., who had not previously claimed, should be admitted as creditors in respect of a certain debt, and should participate in future dividends out of H.'s estate, and should rank in priority to other creditors to the extent of 6*d.* in the pound upon that debt.

Before effect could be given to the order of 1904 H. died, and proceedings for the administration of his estate were taken in the Chancery Division of the High Court:—

*Held*, that the jurisdiction in lunacy ended at the death of H.; that the order of 1904 did not bind the High Court when administering his estate; that on the death of H. his creditors were entitled to have his assets collected and distributed according to their rights as creditors on the estate of a deceased person irrespective of the fact that up to his death his estate was subject to the jurisdiction in lunacy; and that the claim of B. & Co. to priority therefore failed.

By an order of a Master in lunacy (under s. 116 of the Lunacy Act, 1890), dated May 11, 1898, after stating that it

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had been established to the Master's satisfaction that Sir Frederick Seager Hunt, though not lawfully detained as a lunatic, nor so found by inquisition, was through mental infirmity arising from disease incapable of managing his affairs, it was ordered that Dame Alice Harriet Hunt should be authorized to do and execute all such acts, deeds, and things as the Masters in lunacy should settle and approve of for the purpose of protecting his estate, and to exercise the powers of a committee of his estate until further order.

On January 15, 1902, a certificate of the debts of Sir F. Seager Hunt was made, and on May 5, 1902, an order was made, under s. 117 of the Lunacy Act, 1890, that Lady Seager Hunt should apply certain funds in payment to his creditors of a dividend of 6*d.* in the pound on their debts.

On January 19, 1904, a Master in lunacy ordered that Brown, Janson & Co., who had not previously claimed as creditors, should be admitted as creditors against Sir F. Seager Hunt's estate for the sum of 9680*l.* 13*s.* 3*d.*, and should be permitted to participate in all future dividends payable out of such estate, and to rank in priority to other creditors to the extent of 6*d.* in the pound upon that debt.

On January 21, 1904, before effect could be given to the order of January 19, Sir F. Seager Hunt died, and on February 5, 1904, an order was made in the Chancery Division for the administration of his estate. In the administration proceedings Brown, Janson & Co.'s proved debt of 15,601*l.* 9*s.* 11*d.* was allowed by the Master of the Supreme Court on July 31, 1905; but in respect of 9680*l.* 13*s.* 3*d.*, forming part thereof, Brown, Janson & Co. claimed to be paid a dividend of 6*d.* in the pound in priority to the other creditors, and the Master disallowed this claim.

Brown, Janson & Co. applied for an order varying the Master's certificate by allowing the claim to be paid in priority.

*Peterson*, for the applicants. The order of May 11, 1898, was made under s. 116 of the Lunacy Act, 1890, for the management and administration of the estate of a person who, within clause (d), was not detained as a lunatic, "and not found a lunatic by

inquisition, with regard to whom it" was "proved to the satisfaction of the judge in lunacy that such person" was "through mental infirmity arising from disease . . . . incapable of managing his affairs."

The orders of 1902 and 1904 were made under s. 117 of the Act, which enables the judge in lunacy to order that any property of the lunatic may be disposed of for the purpose of "payment of the lunatic's debts or engagements"

It is true that the applicants could not have enforced payment of their debt during Sir F. Seager Hunt's lifetime, at any rate without obtaining a charging order on funds in court, and that a charging order would probably have been made only on the terms that it should not be enforceable until his death, in which case the charge would, on his death, have given the applicants priority: *In re Leavesley*. (1)

It is not contended that the order of May 5, 1902, gave the applicants a charge in respect of their debt, but it recognized the justice of their claim; and the High Court, in administering the estate now that Sir F. Seager Hunt is dead, ought to act equitably by giving the applicants priority so far as is required to put them on a level with other creditors, without disturbing any dividends actually paid to other creditors.

*Buckmaster, K.C.*, and *A. Adams*, for the plaintiff in the administration action. No creditor has any right higher than that which the Court in lunacy can give him. That Court can only do what the debtor, if not lunatic, could do, namely, pay the creditors out of the lunatic's property while the lunatic is alive, and its orders do not bind the High Court administering the estate after the lunatic's death. The applicants could only have obtained a charging order, and that would not have come into operation until the lunatic's death. The applicants have not made out any case for obtaining priority over other creditors.

*T. L. Wilkinson*, for Lady Seager Hunt. "The Court of Lunacy is not executing a trust or administering the estate in any way. The Court of Lunacy is only a custodian of the property of the person who is, by reason of his unsoundness of mind, unable to control it himself. The moment that person dies the

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BUCKLEY J. basis of the jurisdiction in lunacy has gone": per Buckley J. in *In re Dallas*. (1)

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*Peterson*, in reply.

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BUCKLEY J. In this case the Master has disallowed the claim of Messrs. Brown, Janson & Co. to be paid a dividend of 6*d.* in the pound on the amount of their debt, in priority to the other creditors of Sir Frederick Seager Hunt, in the administration of his estate in the Chancery Division of the High Court of Justice.

I think the Master's decision is right. The applicants base their claim on an order in lunacy of January 19, 1904, whereby the Master in lunacy ordered that the applicants should be admitted as creditors against the estate of Sir F. Seager Hunt for the sum of 9680*l.* 13*s.* 3*d.*, and should be permitted to participate in all future dividends payable out of such estate, and to rank in priority to other creditors to the extent of 6*d.* in the pound upon that debt. The matters leading up to that order were as follows. By s. 116 of the Lunacy Act, 1890, relating to "management and administration," the powers and provisions of Part IV. of the Act apply, "(d) to every person not so detained"—that is, lawfully detained as a lunatic—"and not found a lunatic by inquisition, with regard to whom it is proved to the satisfaction of the judge in lunacy that such person is through mental infirmity arising from disease or age incapable of managing his affairs."

An order of a Master in lunacy dated May 11, 1898, after stating as follows, "It having been established to my satisfaction that the said Sir Frederick Seager Hunt though not lawfully detained as a lunatic nor so found by inquisition is through mental infirmity arising from disease incapable of managing his affairs," ordered that "Dame Alice Harriet Hunt be and hereby is authorized to do and execute all such acts, deeds and things as the said Masters shall settle and approve of for the purpose of protecting the estate of the said Sir Frederick Seager Hunt, and to exercise the powers of a committee of the estate of the said Sir Frederick Seager Hunt until further order." Consequent on that order the Court in lunacy,

(1) [1904] 2 Ch. 385, 404.



acting under s. 117 of the Act, inquired into and certified on January 15, 1902, as to the debts owing by Sir F. Seager Hunt, and on May 5, 1902, ordered that Lady Seager Hunt should apply certain funds in payment to his creditors of a dividend of 6*d.* in the pound on their debts.

The applicants subsequently brought in their claim, and the order of January 19, 1904, was made in their favour.

Sir F. Seager Hunt died on January 21, 1904, before effect could be given to the order of January 19, and on February 5, 1904, an order was made in the Chancery Division for the administration of his estate. In the administration proceedings Brown, Janson & Co.'s proved debt of 15,601*l.* 9*s.* 11*d.* was allowed by the Master on July 31, 1905, but in respect of 9680*l.* 13*s.* 3*d.*, forming part thereof, Brown, Janson & Co. claimed to be paid a dividend of 6*d.* in the pound in priority to the other creditors. The Master disallowed this claim, and Brown, Janson & Co. now apply that the Master's certificate may be varied by allowing their claim to be paid the dividend in priority to the other creditors of the testator, Sir F. Seager Hunt.

The jurisdiction in lunacy is one in which the Master in lunacy considers first the welfare of the lunatic and ignores his creditors. During the lunacy the creditors are without remedy, they cannot obtain any payment unless the Master makes an order in their favour. If they apply, the Master in lunacy may order payment of the lunatic's debts owing to them or to some of them as he thinks fit. A creditor may also obtain a charging order on the estate of the lunatic, but he cannot enforce that order until the death of the lunatic.

Mr. Peterson admits that his clients have not obtained a charging order, but he says that as the jurisdiction in lunacy has ordered them to be paid a dividend of 6*d.* in the pound in priority to the other creditors, it is only fair that they should be paid that dividend in priority, and that when the High Court of Justice is dividing the estate of the deceased in administration proceedings that Court ought to consider the order in lunacy as binding upon it.

It is clear that the Court in lunacy cannot bind the High Court. The lunacy jurisdiction was acting on behalf of the

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lunatic, and in dealing with his estate could apply such part of it as it considered reasonable in payment of his debts. The lunacy jurisdiction protects the debtor; if there were no such protection a creditor could obtain execution against his property. In making any order for payment to the creditors the lunacy jurisdiction is doing what seems just to them in disposing of the assets of a living lunatic. But what are the rights of the creditors now that the lunatic is dead? They are to have the assets collected and distributed according to their rights as creditors on the estate of a deceased person, and these are not affected by the fact that his estate was up to the time of his death subject to the jurisdiction in lunacy, and that that jurisdiction acting for him when he was living thought it right to make a particular creditor a particular payment.

That jurisdiction came to an end with his death. It is as if a living man had agreed to pay a particular creditor a particular sum and had died without doing so. In my judgment the Master of the Supreme Court was right in disallowing the claim.

The summons must be dismissed with costs.

Solicitors for applicants: *Hays, Schmettau & Dunn.*

Solicitor for plaintiff: *Alfred Jonas.*

Solicitor for Lady Seager Hunt: *Wellington Taylor.*

F. E.

*In re* SEGELCKE.  
ZIEGLER *v.* NICOL.

[1906 S. 586.]

JOYCE J.

1906

May 15.

*Will—Construction—Gift “in addition to” previous Gift—Intention to make up stated Sum—Miscalculation.*

Testator, after appointing executors and giving various specific and pecuniary legacies, disposed of his residue. By a first codicil he gave a legacy of 1000*l.* to be equally divided between certain of his godchildren therein described. By a subsequent codicil he gave “50*l.* additional to each of my godchildren as named in my will so that each receives 100*l.* each.” On the death of the testator there were nine godchildren answering the description in the first codicil, and they received their shares of the legacy of 1000*l.*, amounting to more than 100*l.* each:—

*Held*, that the bequest in the subsequent codicil was a clear gift of 50*l.* additional to each of the godchildren followed by words of doubtful import, which could not be construed so as to cut it down, and consequently that the additional legacies were payable.

THE testator, Henry William Segelcke, by his will dated May 20, 1887, after appointing executors and trustees, gave numerous specific and pecuniary legacies, including one of 500*l.* to his sister Mathilde Wessels and another of 500*l.* to his nephew Wilhelm Segelcke, and he otherwise disposed of the residue of his estate.

By a first codicil to his will dated August 22, 1895, he gave a legacy in the following terms: “I bequeath the sum of 1000*l.* to be divided equally among such of my godchildren as shall at the time of my decease be the recipients, through my cousin Ferdinand H. Segelcke of Cuxhaven, of Christmas presents from me and I direct that the said sum of 1000*l.* shall be paid to my said cousin Ferdinand H. Segelcke for distribution among my said godchildren accordingly.” He afterwards made two further codicils. The second codicil did not affect the question now before the Court. The third was as follows: “I leave and bequeath the following amounts in addition to the amounts mentioned before in my will and codicils,

JOYCE J. viz. 500*l.* to my nephew and godson Wilhelm Segeleke making  
 1906 the entire legacy to him 1000*l.*, 500*l.* to my sister Mathilde  
 SEGELCKE, Wessels making the entire legacy to her 1000*l.*; 50*l.* addi-  
*In re.* tional to each of my godchildren as named in my will so that  
 ZIEGLER each receives 100*l.* each."  
*v.*  
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The testator died on April 24, 1901, leaving nine godchildren who came within the description in the first codicil, and to each of them the executors had paid a ninth share of the legacy of 1000*l.* This was an originating summons taken out on behalf of the godchildren for the determination of the question whether, according to the true construction of the will and codicils, and in the events which had happened, each of the nine godchildren was entitled to receive the legacy of 50*l.* in the third codicil expressed to be bequeathed to him or her, in addition to his or her share of the legacy of 1000*l.*

*Younger, K.C.*, and *Heckscher*, for the plaintiff. The words following the gift in the third codicil—"so that each receives 100*l.* each"—are the mere expression of the testator's calculation of the effect of this and the previous gift. Being erroneous, they may be disregarded. The testator may have meant that each of the godchildren should receive "at least" 100*l.* At any rate, they are words of doubtful import, and cannot be used to cut down a clear and substantive gift. The additional legacies of 50*l.* each are payable: *Gordon v. Hoffmann* (1); *Mann v. Fuller* (2); *In re Rowe* (3); *Whitfield v. Clemment* (4); *Morgan v. Middlemiss* (5); *Ives v. Dodgson*. (6)

*Hughes, K.C.*, and *Daniel Jones*, for the defendants. The godchildren each received more than 100*l.* under the first bequest to them, and they can take nothing more under the third codicil. In such a case where the intention to give a certain sum, and no more, is clear, then that is paramount. Mere motive is immaterial. It is the intention which must be regarded: *Milner v. Milner*. (7) In that case Lord Hardwicke expressed

(1) (1834) 7 Sim. 29.

(4) (1816) 1 Mer. 402.

(2) (1854) Kay, 624.

(5) (1866) 35 Beav. 278.

(3) [1898] 1 Ch. 153.

(6) (1870) L. R. 9 Eq. 401.

(7) (1748) 1 Ves. Sen. 106.



his opinion that where a testator has given more than sufficient to make up a given sum which he has expressed his intention to bestow the gift should abate. That view has never been dissented from. There was here a misapprehension on the part of the testator as to the amount required to make up the 100*l.* which he intended each godchild should have. The question is, what is the dominant idea? Did the testator mean that each godchild was to have an additional legacy, or did he merely wish to ensure that each should have a certain fixed sum, viz., 100*l.*? He shews by the language he has used that the latter was his dominant intention. That dominant intention is carried out by the gift in the first codicil, and the additional legacy in the third can have no effect: *Jordan v. Fortescue* (1); *Farrer v. St. Catherine's College, Cambridge* (2); *Whitfield v. Clemment* (3); *Wilson v. Morley* (4); *Morgan v. Middlemiss* (5); *Trevor v. Trevor* (6); 1 Jarman on Wills, 5th ed. p. 495.

*Heckscher*, in reply. *Milner v. Milner* (7) and *Trevor v. Trevor* (6) were very different from the present case. The testator in each case was making a definite provision for his daughter or his wife, and the intention was clear. There is no case where such a provision has been cut down. What Lord Hardwicke said in *Milner v. Milner* (7) as to the legacy abating was only dictum, and what Sir J. Leach said in *Trevor v. Trevor* (6) as to election cannot be supported.

JOYCE J. In this case the testator by the first codicil to his will gave the sum of 1000*l.* "to be divided equally among such of my godchildren as shall at the time of my decease be the recipients through my cousin Ferdinand H. Segelcke of Cuxhaven, of Christmas presents from me," and then by a later codicil, by which certain additional legacies were given to various people, he gives "50*l.* additional to each of my godchildren as named in my will so that each receives 100*l.* each." Now, it turned out that at the date of the testator's death there were

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(1) (1847) 10 Beav. 259.

(4) (1877) 5 Ch. D. 776.

(2) (1873) L. R. 16 Eq. 19.

(5) 35 Beav. 278.

(3) 1 Mer. 402.

(6) (1828) 5 Russ. 24.

(7) 1 Ves. Sen. 106.

JOYCE J. only nine such godchildren as referred to in the first codicil, so  
1906 that if the 50*l.* additional is to be given to each of those god-  
SEGELCKE, children, then they would each receive more than 100*l.*; and in  
*In re.* fact they have each received or are entitled to more than 100*l.*  
ZIEGLER already under the first codicil.  
*v.*  
NICOL.

No point is made, and no point could be made, I think, about the reference being to godchildren named in the will, whereas the fact is that there are no godchildren named in the will, but only in a codicil, namely, in the first codicil. But it is said that under the circumstances this gift, or the supposed gift, in the codicil of 50*l.* additional is absolutely nugatory, and that I must read this codicil as if the whole clause had never been inserted; in other words, I must strike that clause out of the codicil. As I read the codicil, it appears to me that the clause in question contains a clear gift by the testator of 50*l.* additional to each of the godchildren referred to in the third codicil. Following that there are some words which may either indicate the motive the testator had in making the gift, or, as it appears to me, may be a mere miscalculation, a misstatement of what they would receive under the circumstances. I am asked to read these words as if they meant "so that each receives 100*l.* and no more." Perhaps that is not quite accurate, but it appears to me that those words, "so that each receives 100*l.* each," may have been inserted for various reasons—I do not know exactly for what reason they were inserted—and they may mean any one of a number of different things. They may mean that, according to the testator's understanding or expectation with respect to the number of his godchildren at his death, each will have a legacy of 100*l.* at least. A number of cases have been cited to me where a figure has been named in the will and codicil, and the amount of the gift indicated by that figure has been increased by reason of some following statement as to the object of the testator in making the gift. But no case has been cited to me in which the figure named in an express and plain gift has been cut down by words following, which words may be capable of being taken merely as a miscalculation of what the legatee or the person who was to take the benefit would receive. I cannot conceal from myself that what I am going to decide in

this case is contrary to the dictum (it is only a dictum) in *Milner v. Milner* (1); but there is one principle which is never departed from in the construction of wills, and that is, that a clear gift is not to be cut down by subsequent words of doubtful import. (See 1 Jarman, 5th ed. p. 495.) I am really asked to strike out this clause with respect to godchildren altogether from the codicil, and to deprive the gift of the additional legacy of 50*l.* of any meaning at all because some words follow which may only have been inserted under some misapprehension, or may be, as in *Morgan v. Middlemiss* (2), merely a miscalculation of what the legatees would receive under the two gifts—the gift in the first codicil and the gift in the third. I must hold that the additional legacies are payable.

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NICOL.

Solicitors: *Jenkins, Baker & Co.; Nicol, Son & Jones.*

G. A. S.

*In re* GLASSINGTON.  
GLASSINGTON *v.* FOLLETT.

[1906 G. 151.]

JOYCE J.  
1906  
May 9, 10;  
June 1.

*Will—Construction—General Devise of Real Estate—No Real Estate—Testatrix entitled to Proceeds of Sale of Realty subject to Trust for Sale—Intention—Extrinsic Evidence—Admissibility.*

A testatrix devised all her real estate to trustees upon trust to pay the net rents and profits (subject to the payment thereof of a life annuity of 200*l.* to her husband) to her sister during her life, and after the sister's death upon trust as to the said real estate and the income thereof for the sister's children, and the testatrix conferred upon her trustees power to demise and other powers incident to the management of real estate. The testatrix was not beneficially entitled to any real estate either at the date of her will or at her death, but at both those dates she was entitled, subject to certain subsisting annuities, to a moiety of the income and capital of the proceeds of sale of certain freehold property devised by her father's will upon trust for sale and vested in her as trustee of his will. There had been no election by the beneficiaries to take the freehold property unconverted:—

*Held*, that the devise in the testatrix's will passed all the beneficial

(1) 1 Ves. Sen. 106.

(2) 35 Beav. 278.

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interest to which she was entitled in the real estate held upon trust for sale under her father's will.

The admissibility of extrinsic evidence in aid of the interpretation of wills, discussed.

## ADJOURNED SUMMONS.

By her will dated January 29, 1903, the testatrix, Louisa Anna Catharina Glassington, after appointing her husband, the plaintiff Charles William Glassington, and the defendant William Frederick Follett executors and trustees, devised and appointed all the real estate of or to which she should be seised or entitled, or over which she should have any power of disposition or appointment by will at the time of her death, unto and to the use of her trustees. "Upon trust that my trustees shall receive the rents and profits of and manage my real estate and every part thereof as they may think proper with power to demise or let the same or any part or parts thereof either from year to year or for any term or number of years and generally upon such terms as my trustees shall think proper with power to accept surrenders from and make allowances to and arrangements with tenants and others and with power to employ or appoint and pay receivers managers agents or others and with all other powers expedient or desirable for the due management of my real estate And upon trust that my trustees shall out of the net rents and profits of my real estate pay to my said husband and his assigns if he shall survive me during his life an annuity of 200*l.* by equal half-yearly payments the first payment to be made at the end of six calendar months after my death And I declare that subject to the foregoing trust in favour of my said husband my trustees shall pay the net residue of the rents and profits of my real estate unto my sister Amelia Elizabeth Pither the wife of Ernest Pither for her life And after her death and subject as aforesaid that my trustees shall stand possessed of my said real estate and the income thereof Upon trust for such of the children of my sister the said Amelia Elizabeth Pither as shall survive me," sons at twenty-one, daughters at twenty-one or marriage. The testatrix gave, bequeathed, and appointed all her residuary personal estate whatsoever and wheresoever over which she might have any power



of disposition or appointment, subject to the payment thereof in exoneration of her real estate, so far as the same would extend, of her funeral and testamentary expenses and debts and legacies, unto her husband, the plaintiff, absolutely.

The testatrix died on July 25, 1904, and the plaintiff and the defendant Follett duly proved her will on November 9, 1904.

It was admitted that at the date of her will and death the testatrix had no beneficial interest in any real estate in the strict sense of the term, but was beneficially entitled under the will of her father (who died in 1867) during the life of his wife, who was still alive, to one moiety of the annual produce (subject to the payment of certain annuities still subsisting) of the proceeds of sale of certain freehold property devised by his will to his trustees upon trust for sale at their discretion but not without the previous consent in writing of his wife during her life, and after the death of his wife, the testatrix and her sister the defendant A. E. Pither were, under the trusts of the testator's will, and in the events which had happened, entitled absolutely in equal shares as tenants in common to the capital of the proceeds of sale of the freehold property. The testator's will provided that until sale of his devised real estate the same should for all the purposes of the trusts therein contained be considered as money or personal estate, and be transmissible accordingly, and that the rents and profits until sale should be applicable as if the same were income of the proceeds of sale.

None of the real estate subject to the trusts of the testator's will had as yet been sold, and the testatrix had been for twenty years before her death trustee of the testator's will.

Upon her marriage in 1882, the defendant Mrs. A. E. Pither had settled the moiety to which she was entitled as above-mentioned under the will of her father.

The plaintiff took out this summons against his co-executor and the defendant Mrs. A. E. Pither and her children, of whom one was *sui juris* and the others were infants, for the determination of the question whether the moiety to which the testatrix was entitled in the moneys to arise from the sale of the real estate devised upon trust for sale by the testator's will passed

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JOYCE J. under the devise of real estate contained in the testatrix's will or  
1906 under the residuary bequest.

GLASSING- An affidavit had been filed on behalf of the defendant Mrs.  
TON, Pither and her children dealing with the circumstances of the  
*In re.* case and with the instructions given by the testatrix for the pre-  
GLASSING- paration of the will in question, and stating (*inter alia*) that  
TON v. the case and with the instructions given by the testatrix for the pre-  
FOLLETT. paration of the will in question, and stating (*inter alia*) that  
in giving those instructions the testatrix said that her only real  
estate consisted of her half of the freehold property comprised  
in her father's trust estate, and that she wished to confer full  
powers on her trustees of managing her real estate.

*Hughes, K.C.*, and *Potts*, for the plaintiff. The moiety to which the testatrix was entitled under her father's will was not real estate in contemplation of law, and does not come within the description of "real" estate. The freeholds, having been devised upon trust for sale, became personalty and must devolve accordingly: *Fletcher v. Ashburner* (1); *Lingen v. Sowray* (2); *Edwards v. Countess of Warwick* (3); *Lechmere v. Earl of Carlisle* (4); *Stead v. Newdigate* (5); *In re Duke of Cleveland's Settled Estates*. (6) It is impossible to suggest that all the persons interested under the trusts of the testator's will elected to take this property as land.

This gift is clear and unambiguous. There is a gift of real estate on the one hand and of personal estate on the other, and when the testatrix uses the phrase "real estate" she must be taken to have meant real estate in the strict sense. In *In re Grainger*, (7) Rigby L.J. says: "It has not been contended here, or indeed in any case since the publication in 1831 of the first edition of Sir James Wigram's treatise on 'The Rules of Law respecting the Admission of Extrinsic Evidence in aid of the Interpretation of Wills,' that if a will, upon the face of it and independently of extrinsic evidence, ought to bear a definite construction, that construction can be varied by evidence *dehors* the will." That is exactly in point

(1) (1779) 1 W. & T. 7th ed. 327;  
1 Bro. C. C. 497.

(2) (1711) 1 P. Wms. 172.

(3) (1723) 2 P. Wms. 171.

(4) (1733) 3 P. Wms. 211, 220.

(5) (1817) 2 Mer. 521.

(6) [1893] 3 Ch. 244.

(7) [1900] 2 Ch. 756, 762. In  
House of Lords sub nom. *Higgins v.*  
*Dawson*, [1902] A. C. 1.

in this case. This will is absolutely plain upon the face of it, and capable of only one judicial construction. It is only when extrinsic evidence is looked at that any doubt arises; and the defendants by extrinsic evidence want to contradict the will, not explain it. This is not a case of misdescription. Real estate cannot include personal estate. The question whether she had any real estate or not at the time of making her will is not material. "Real" and "personal" estate are technical terms, and evidence is not admissible to shew that they were used otherwise than in their primary and technical sense.

*Younger, K.C.*, and *Austen-Cartmell*, for the defendant A. E. Pither and her children. The testatrix must have meant that this gift should comprise something substantial to provide for the annuity. She evidently contemplated that she was dealing with something that would produce 200*l.* per annum. She did not intend the whole of her property to go to her husband absolutely. Since 1884 she had been one of the trustees of her father's will, with the legal estate in this freehold property vested in her.

[JOYCE J. She was seised at law of the legal estate as joint tenant, and beneficially entitled in equity as tenant in common.]

Yes; and although in the eye of a Court of Equity she had not, strictly speaking, any real estate, yet in popular language she would be said to have real estate. It is only necessary to look at these facts and at the scheme of the will to arrive at a conclusion as to what the testatrix intended to dispose of. The Court can and will say either that she intended her interest in this freehold property to pass under the devise in her will, or, if there is any difficulty as to that, then that her interest was of such a nature that she must be taken to have elected to take the realty unconverted. Sir W. Grant's judgment in *Stead v. Newdigate* (1) is in these defendants' favour, and it is reasonably clear that what the testatrix was disposing of was an interest in real estate within Sir W. Grant's words. *Standen v. Standen* (2)

(1) 2 Mer. 521.

(2) (1795) 2 Ves. Jun. 589; (1797)  
6 Bro. P. C. 193.

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was a somewhat analogous case. There, a power of appointment over the proceeds of sale of real estate was held well executed by a devise of real estate.

In the case of every will, some extrinsic evidence must be admissible, e.g., to shew of what the estate consists. In this case extrinsic evidence is admissible to shew what interests in real estate the testatrix had at her death: *Selwood v. Mildmay* (1); *Miller v. Travers* (2); *Doe v. Hiscocks* (3); *Higgins v. Dawson* (4); Taylor on Evidence (10th ed.) p. 879; Hawkins on Wills, p. 9; Wigram on Extrinsic Evidence (3rd ed.) Prop. 2, p. 17.

The question is, what in point of law and fact, was the condition of this property which came to the testatrix under the will of her father, at the time when she made her own will and at her death. We submit that it was unconverted real estate: *Hyett v. Mekin* (5); *Goodier v. Edmunds* (6); *Davies v. Goodhew* (7); *Sykes v. Sheard*. (8)

*Maugham*, for the defendant Follett.

*Hughes, K.C.*, in reply. "Real estate" is a technical term and the proper legal effect must be attributed to it: *Abbott v. Middleton* (9); *Roddy v. Fitzgerald* (10); *Leach v. Jay*. (11) There is a clear conversion in this case, the time only is left undetermined. This is different from a devise of specific land which might pass land directed to be sold. In that case evidence could be adduced to shew misdescription, there being a latent ambiguity. But there is no ambiguity here. The question is, what is included in a general devise of "all my real estate." *Standen v. Standen* (12) does not apply since the Wills Act, and a general devise by a testator who has no real estate of his own, will not, since that Act, operate as an exercise of a special power of appointment over real estate whether subject or not to a trust for sale: *In re Mills*, (13);

(1) (1797) 3 Ves. 306.

(2) (1832) 8 Bing. 244.

(3) (1839) 5 M. & W. 363.

(4) [1902] A. C. 1.

(5) (1884) 25 Ch. D. 735.

(6) [1893] 3 Ch. 455.

(7) (1834) 6 Sim. 585.

(8) (1863) 33 Beav. 114.

(9) (1858) 7 H. L. C. 68.

(10) (1857) 6 H. L. C. 823, 877.

(11) (1877) 6 Ch. D. 496.

(12) 2 Ves. Jun. 589; 6 Bro. P. C. 193.

(13) (1886) 34 Ch. D. 186.



*In re Williams*, (1); *Adams v. Austen*. (2) The general devise in the present case cannot pass real estate which was converted immediately on the death of the testator under whose will this testatrix was entitled. The Court really is asked to construe "real estate" as including personal estate.

*Cur. adv. vult.*

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June 1. JOYCE J. In this case the testatrix by her will devised and appointed all the real estate of or to which she should be seised or entitled, or over which she should have any power of disposition or appointment by will at the time of her death, to trustees upon trust to receive the rents and manage the real estate, with power to demise or let and with other incidental powers, and out of the net rents and profits of what she calls "my real estate" to "pay to my husband if he shall survive me during his life an annuity of 200*l.* by equal half-yearly payments," and, subject to the foregoing trusts in favour of the husband, the trustees were to pay the net residue of the rents and profits "of my real estate" to the defendant Mrs. Pither for her life, and after her death they were to stand possessed of the testatrix's said real estate and the income thereof upon trust for Mrs. Pither's children, as in the will mentioned. Then later on the testatrix gives, bequeaths, and appoints all her residuary personal estate to her husband, the plaintiff, subject to the payment thereof, in exoneration of her real estate so far as the same should extend, of her funeral and testamentary expenses, debts, and legacies.

Upon a perusal of the will alone it is plain, at least to my mind, that the testatrix was intending to dispose of something referred to as real estate in favour of her sister and her sister's children subject to the husband's annuity, and that she was intending to devise or dispose of something which she considered that she had, just as much as if she had said: "I give and devise my real estate," and so on, meaning thereby, or having in view, the real estate to which she considered herself to be then entitled.

The testatrix died in July, 1904. Neither at her death, nor

(1) (1889) 42 Ch. D. 93.

(2) (1829) 3 Russ. 461.

JOYCE J. at the date of her will was she entitled, except as trustee, to  
 1906 any real estate in the strict technical legal sense, but she was  
 GLASSING- beneficially interested in a moiety of certain real estate which  
 TON, had been devised by her father and the legal estate in which  
*In re.* was, in fact, vested in her as the trustee. [His Lordship, after  
 GLASSING- referring to the provisions of the father's will, continued:—] Now  
 TON the annuitant, the widow of the original testator, was still living.  
 FOLLETT. The land and houses, the subject of the devise in his will, were  
 ——— unsold, and the testatrix was receiving a moiety of the rents  
 subject to the payment to the testator's widow of an annuity  
 which was still subsisting, and the land could not be sold without  
 the consent of the widow during her life. This testatrix, then,  
 had power to dispose of a moiety of the proceeds of sale of the  
 estate devised by her father upon trust for sale, and indeed she  
 had power to dispose of an undivided moiety of that real estate  
 in specie, subject only to the right of the owner of the other  
 moiety to require a sale of the whole. But, as Bowen L.J.  
 expresses it in *Attorney-General v. Hubbuck* (1), "it is an estab-  
 lished principle in equity that when money is directed or agreed  
 to be turned into land, or land agreed or directed to be turned  
 into money, equity will treat that which is agreed to be, or which  
 ought to be, done as done already, and impresses upon the  
 property that species of character for the purpose of devolution  
 and title into which it is bound," if it is bound, "ultimately to be  
 converted." The testatrix had not, and never had, any real  
 estate, except as trustee, in the strict legal technical sense, but in  
 a popular sense she had, and nine out of ten ordinary persons  
 would have said that she was entitled to real estate. I think  
 there can be little doubt as to what she herself would have  
 answered if she had been asked whether or not she was entitled  
 to real estate.

An affidavit with regard to the circumstances of the case has  
 been mentioned, although it has not been read, but I am aware  
 of what it contains. I am not certain that some part of the  
 statements in that affidavit are not admissible in evidence.  
 Declarations by a testator on a point collateral to the question  
 of intention may be evidence of an independent fact material

(1) (1884) 13 Q. B. D. 275, 289.

to the right interpretation of the testator's words. I am not sure that evidence of her statement that she was entitled to real estate is not admissible. I am not going further than that. Evidence of her intention or instructions is of course not admissible, and I do not intend to rely upon any of the statements in this affidavit.

It is well settled in my opinion—I am reading from Proposition 3 in Wigram on Extrinsic Evidence (3rd ed. at p. 42)—that, “Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are insensible with reference to extrinsic circumstances, a Court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, with reference to these circumstances, they are capable.”

Now here is a case in which, strictly speaking, the words of the gift are not sensible with respect to extrinsic circumstances. When I say that, of course I am assuming that I am right in what I said before as to the intention appearing upon the face of the will to dispose of something or other which the testatrix thought she had, and which she called “real estate.”

A power to appoint proceeds of sale of an estate is well executed by an appointment of the estate itself. Again, if a legatee of proceeds of sale of land directed to be sold devise the land in its character of real estate, the devisee will be entitled to the fund: Jarman on Wills 5th ed. vol. i. p. 567. Sir William Grant's judgment in the case of *Stead v. Newdigate* (1), cited during the arguments, contains the following passage: “I do not, therefore, think it can be of any consequence, what the actual state of the property was at the time of his death. But still he might dispose of his reversionary interest in the property, by whatever denomination he thought fit. And if it clearly appeared, that his meaning was that it should pass under the description of his real estate, there is nothing to prevent his intention from having effect.” I may also refer to the judgments of Lindley and Kay L.JJ. in *In re Lowman* (2), which I agree, however, was a much stronger case than the present.

(1) 2 Mer. 521, 531.

(2) [1895] 2 Ch. 348, 354, 361.

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JOYCE J. It was contended, however, before me that by reason of the recent decision in *In re Grainger* (1) no evidence of extrinsic circumstances could be regarded or admitted in this case. I am not quite sure how far that proposition was intended to be carried, but the contention was something like that. Now, in my opinion, there is nothing in *In re Grainger* (1) which conflicts with what I am about to decide in the present case. There it was attempted to make out by evidence with respect to the nature and amount of the testator's property that by the term "residue" of two specified sums (lent upon mortgage) after payment of his "debts and funeral expenses," the testator must have meant the residue after the payment of his debts, legacies, and funeral expenses. For such a purpose such evidence never has been admissible, and I think I may say it could not be admissible where the words were perfectly clear, because parol evidence is not to be resorted to except for the purpose of proving a fact which makes intelligible something in the will that, without the aid of extrinsic evidence, would not be intelligible. Neither in the judgment of Rigby L.J., nor in any of the judgments in the House of Lords, is it disputed that evidence is admissible to explain the words of a will in reference to the ascertainment of persons and things insufficiently described or explained by the words of the will, the fundamental distinction, as is pointed out by Rigby L.J. in the Court of Appeal, being between evidence "explanatory of the words of the will themselves, and evidence sought to be applied to prove intention itself as an independent fact." I think there is nothing in that case which is at variance with the proposition laid down in Wigram on Extrinsic Evidence (3rd ed., at p. 51), namely: "For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, . . . for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will."

(1) [1900] 2 Ch. 756, 763. Sub nom. *Higgins v. Dawson*, [1902] A. C. 1.



In the case of *Higgins v. Dawson* (1) it was not, in my opinion, intended to overrule the multitude of cases in which, where the particular terms used, whether purporting to describe things or persons, were insensible with reference to extrinsic facts, evidence of the surrounding circumstances has been admitted to see whether such terms had not been employed in some secondary sense not substantially different. I may instance the numerous cases in which the word "child" or "children," which, of course, means strictly lawful child or lawful children, has been held in the circumstances to denote reputed or illegitimate children. Or again, cases like *In re Weeding* (2), before North J., where the will of the testatrix purported to dispose of certain particular securities which she apparently had in a certain railway, and it turned out that she had no such securities; whereupon evidence of the surrounding circumstances was looked at in order to determine whether the testatrix did not really mean to refer to some other security of a similar but somewhat different character. A recent case of the same kind in the Court of Appeal is *In re Rowe*. (3)

The result is that upon the will of the testatrix in the present case, reading it as I do, and with the aid of the facts which I consider are properly admissible in evidence according to the settled rules of the Court with reference to the admission of extrinsic evidence to explain terms used which, when taken literally, are not sensible with regard to the surrounding circumstances, I come to the conclusion that the testatrix did intend, under the denomination of her real estate, to dispose of all the beneficial interest to which she was entitled in the real estate held upon trust under the will of her father, and there must be a declaration accordingly.

Solicitors: *Philpot & Morrell; Fladgate & Co.*

(1) [1902] A. C. 1.

(2) [1896] 2 Ch. 364.

(3) [1898] 1 Ch. 153.

SWINFEN  
EADY J.

1906

May 1, 3.

*In re* CORSELLIS.  
FREEBORN *v.* NAPPER.

[1905 C. 4039.]

*Will—Construction—Testator Illegitimate—Bequest to “all my Nephews and Nieces”—Some named—Some “Brothers and Sisters” named—Children of unnamed natural Sister.*

A testator whose parents were never married had lived with them and his natural brothers and sisters as one family and treated them as his lawful relatives.

In his will he referred by name to all living natural brothers and sisters as his brothers and sisters and to some of their children as his nephews and nieces, but he did not mention a deceased natural sister or her children, and there was no evidence that he knew of the existence of those children. He made a bequest to “all my nephews and nieces” living at a certain period:—

*Held*, that the children of the deceased natural sister were entitled to share in this bequest.

*In re Jodrell*, (1890) 44 Ch. D. 590; [1891] A. C. 304, 309, applied.

*Meredith v. Farr*, (1843) 2 Y. & C. Ch. 525, distinguished.

ORIGINATING SUMMONS.

By his will dated January 9, 1872, a testator, after giving certain legacies (inter alia) to “my brother Charles . . . . my brother Nicholas . . . .” and “my relative Arthur . . . .” devised and bequeathed his residuary real and personal estate to his trustees on trust for sale and conversion, and directed them to hold the proceeds upon trust for his wife for life, and after her death “upon trust for the five following persons in equal shares and in the manner hereinafter mentioned (namely) my brother Charles . . . . and my sisters Frances . . . . Emily . . . . Caroline . . . . and Eliza . . . . . The income of the share of my brother Charles . . . . is to be paid to him for life and at his death the principal is to be divided equally or in such proportions amongst all or such one or more of my nephews and nieces as my wife shall direct by deed or will and subject thereto amongst all my nephews and nieces then living”—which the Court construed as “living at Charles’ death.” “The income

of the share of my sister Caroline . . . . is to be paid to her for life and at her death the principal is to be divided equally or in such proportions amongst such of my nephews and nieces as my wife shall direct by deed or will and subject thereto amongst all my nephews and nieces then living"—construed as "living at Caroline's death." "If my sister Frances . . . . should not survive my wife, her share is to be divided equally amongst my nephews Henry . . . . and . . . . George . . . . and my niece . . . . Sarah. . . . If my sister Emily . . . . should not survive my wife, her share is to be equally divided amongst her children living at my wife's death. If my sister Eliza . . . . should not survive my wife, her share is to be equally divided amongst her children (not omitting the said . . . . Sarah . . . .) living at my wife's death."

The testator died on August 7, 1873. Caroline died on April 24, 1874, without children; and Charles died on January 1, 1876, without children. The testator's widow, who survived all his brothers and sisters, died on April 22, 1905, without exercising her power of appointment, and the fund became divisible.

The testator's father and mother were never married. He had a natural sister Mary besides the six natural brothers and sisters named in the will. She died about nineteen years before the date of the will, viz., on February 15, 1853, leaving children, one of whom survived Caroline and one of whom survived Charles.

The testator when young had lived with his father and mother and his seven natural brothers and sisters as one family, and had always treated his natural brothers and sisters as lawful relatives just as if his parents had been married. There were many natural nephews and nieces besides Frances' sons Henry and George and Eliza's daughter Sarah who were named in the will. There was no evidence that the testator knew of the existence of Mary's children.

This summons was issued to determine (inter alia) whether Mary's children were included in the gift to nephews and nieces, seeing that neither Mary nor her children were named in the will.

SWINFEN  
EADY J.

1906

CORSELLIS,  
*In re.*

FREEBORN  
*v.*  
NAPPER.

SWINFEN  
EADY J.

1906

CORSELLIS,  
*In re.*

FREEBORN

*v.*  
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*L. H. Elphinstone*, for the executor of the last surviving executor and trustee.

*T. L. Wilkinson* and *Peterson*, for persons claiming under Frances' children. The testator had and could have no lawful nephews and nieces. He must therefore have referred to natural nephews and nieces. But the bequest should be confined to the natural nephews and nieces named in the will, and the children of natural brothers and sisters therein named: *In re Jodrell*. (1)

[SWINFEN EADY J. In that case the gift was to "my relatives hereinbefore named." Here it is to "all my nephews and nieces."]

In *Meredith v. Farr* (2) the bequest to the children was general, but only the illegitimate children named in the will were allowed to take.

[SWINFEN EADY J. In that case there was competition with legitimate children.]

There is no evidence that the testator knew of the existence of Mary's children.

*J. W. Manning*, for persons claiming under Mary's children. The testator obviously uses the words "brother," "sister," "nephew," and "niece" in the sense of natural relationship, and there is nothing in the will to exclude Mary's children from the gift to "all my nephews and nieces then living": *In re Jodrell* (1); *In re Deakin* (3); *In re Wood*. (4) The testator's knowledge or ignorance of their existence is immaterial.

*Vaughan Hawkins* and *Cavanagh*, for other parties.

SWINFEN EADY J. The question is, who are the persons entitled to the share of residue bequeathed after the wife's death to Charles for life and at his death (in default of appointment by the wife) to "all my nephews and nieces then living"? A similar question arises as to Caroline's share. The testator had not and could not have any lawful nephews and nieces, as his father and mother were never married. Who, then, are to take under the words "all my nephews and nieces then living"? It appears, and is not disputed, that the testator and his seven natural brothers

(1) 44 Ch. D. 590; [1891] A. C. 304. (3) [1894] 3 Ch. 565.

(2) 2 Y. & C. Ch. 525.

(4) [1902] 2 Ch. 542, 548.



and sisters, including Mary, lived with their parents as one family in the same way as if the parents had been married, and were all treated by the testator and his parents as lawful children. In his will the testator refers by name to some, though not all of them, as his brothers and sisters, and to some, though not all of their children, as his nephews and nieces. He also refers to Arthur as his relative, though, being himself illegitimate, he had and could have no lawful relatives other than descendants. On these facts it is clear that the testator made his testamentary dispositions on the footing that his parents were to be deemed lawfully married. On that footing Arthur would have been a relative, and the persons called brothers and sisters, nephews and nieces, would have been lawful brothers and sisters, nephews and nieces. It is contended that the nephews and nieces must be confined to the natural nephews and nieces named in the will, and the children of natural brothers and sisters therein named. The gift, however, is to "all my nephews and nieces then living." Why should it be confined to some only? As there was no possibility of lawful nephews and nieces who could compete with the natural nephews and nieces, it was conceded that if there had been no reference to specific brothers and sisters or nephews and nieces in the will all children of natural brothers and sisters would have been included. As, however, there is such a reference, it is sought to confine the expression "all my nephews and nieces" to the children of the natural brothers and sisters named in the will. The language of the will does not enable me to restrict the class in this manner. The gift is not, as in *In re Jodrell* (1), restricted to "my relatives hereinbefore named." On the contrary, it is to "all my nephews and nieces," and, as the testator had and could have no lawful nephews and nieces, he must have intended his natural nephews and nieces. There is no other alternative. There is no difficulty in ascertaining them. The testator and his seven natural brothers and sisters lived together with their father and mother as one family, and the relationship was mutually recognized. Under those circumstances *Hill v. Crook* (2) directly applies, as the testator has indicated with sufficient certainty what he

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(1) 44 Ch. D. 590; [1891] A. C. 304.

(2) (1873) L. R. 6 H. L. 265.

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meant. In *In re Jodrell* (1) Lord Hannen in the House of Lords says (2): "It is clear that the testator in his will called persons who were not legitimately connected with him his 'cousins,' that is, he treated them as relatives. This affords us a guide as to what he means when he speaks of his 'relatives' in the residuary clause." In the same way in the present case, by referring to Nicholas, Charles, Frances, Emily, Caroline, and Eliza as his brothers and sisters, and to Henry, George, and Sarah, daughter of Eliza, as his nephews and niece, the testator has shewn what he meant by the expression "nephews and nieces." The children of Mary, who was a natural sister, were therefore as much entitled to share as the children of the other natural brothers and sisters, and there will be a declaration to that effect.

Solicitors: *William Thomas Coventon, for G. Brown & Elmhirst, York; Indermaur & Brown, for Cardens, Brighton; W. J. Homewood.*

1) 44 Ch. D. 590; [1891] A. C. 304.

(2) [1891] A. C. 309.

*In re* BOOTH.  
BOOTH v. ROBINSON.

[1903 B. 4176.]

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April 26;  
May 3, 5.

*Election—Compensation—Several Persons electing to take against Will and taking other Benefits under it—Compensation inter se—Benefits received under Will—Compensation received included in Benefit.*

B. by his will purported to dispose of property comprised in a settlement, under which he took a life interest only without any power of disposition, as well as of his own property. Some of the persons entitled under the settlement took other benefits under the will. They all elected to take against the will. This election deprived some of the electing parties of shares in the settled property given to them by the will:—

*Held*, that the persons electing to take against the will were respectively bound to make compensation to other persons so electing, as well as to persons who took under the will only, for any disappointment occasioned by the election to the extent of the benefits received under the will by the several persons electing to take against it.

*Held*, also, that all compensation so paid to any person electing to take against the will must be included in the benefits received by him under the will.

JOSEPH BOOTH, the testator, was at his death absolutely entitled to four small pieces of copyhold property, which were distinguished in the Master's certificate, hereinafter mentioned, by the letters A, B, C, E. He was also entitled for his life, under a settlement created by a surrender to trustees dated September 23, 1874, to four other pieces of copyhold property, distinguished in the said certificate by the letters F, G, H, I, but over these he had no power of disposition. In the events which had happened they were held at his death in trust for all his children who attained twenty-one in equal shares absolutely.

It will be convenient to refer to the different properties by the letters used by the Master.

The testator died in 1901, having by his will appointed Joseph William Booth and James Stephenson executors and trustees, and made the following devises: (1.) A, B, C, and F to his trustees upon trust to sell and out of the proceeds to pay certain mortgage

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debts, and to divide the residue of the proceeds equally between his daughter Mary Jane Robinson (in the will called Jane Booth), Ann Booth (the widow of his deceased son John Booth), Robert Booth (the son of his eldest daughter Elizabeth), and such of the children of his son John Booth as might be alive at his death ; (2.) G, H, and E to his daughter Annie Booth absolutely ; (3.) I to his son Joseph William Booth.

The testator's will was proved on June 25, 1901. This summons was taken out by the trustees in 1903 for the determination, among others, of the question whether and to what extent the persons entitled to real estate under the said settlement were put to their election, as between their interests under the said settlement and their interests under the said will, and, if this question were answered in the affirmative, that all necessary directions might be given by the Court as to the adjustment of the rights of the parties by way of compensation or otherwise.

By the order made on this summons on April 21, 1904, certain questions not requiring a report were answered, and inquiries were directed, among others, which of the persons interested under the will were entitled to the hereditaments comprised in the settlement, and in what shares, and what were the values of, and the incumbrances on, the different properties expressed to be devised by the will.

The Master's certificate in answer to these inquiries, dated February 23, 1906, certified that the persons who were at the date of the testator's death entitled to the property comprised in the settlement and their respective shares were :—

- (1.) Mary Jane Robinson, testator's daughter . . One-fifth
- (2.) Joseph William Booth, testator's son. . . One-fifth
- (3.) Annie Booth, testator's daughter . . . One-fifth
- (4.) Joseph Longstaffe Booth, heir-at-law of  
testator's son Thomas . . . . . One-fifth
- (5.) Francis Booth, heir-at-law of testator's son  
John . . . . . One-fifth

The plaintiff Joseph William Booth died between the date of the testator's death and that of the certificate, having devised his share under the settlement to Annie Booth.



The values of the properties were certified as follows :—

|                                                  |       |
|--------------------------------------------------|-------|
|                                                  | £     |
| A, B, C, together £790, less mortgage for £620 . | 170   |
| E, £300, less share of mortgage, £65 . . .       | 235   |
|                                                  | <hr/> |
| Total properties passing under will . .          | £405  |
|                                                  | <hr/> |
|                                                  | £     |
| F . . . . .                                      | 435   |
| G . . . . .                                      | 400   |
| H . . . . .                                      | 340   |
| I. . . . .                                       | 1420  |
|                                                  | <hr/> |
| Total properties comprised in settlement .       | 2595  |
| Mortgage to be deducted rateably . . .           | 535   |
|                                                  | <hr/> |
|                                                  | £2060 |
|                                                  | <hr/> |

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The persons entitled under the settlement were all of full age, and elected to take under the settlement and against the will.

The result of the facts so certified was that of the parties who were interested under the settlement Mary Jane Robinson, Annie Booth (the testator's daughter), and Francis Booth (the heir of John), took under the will interests in the testator's own property, out of which they were clearly bound to make compensation to the persons disappointed by their election. But the will also purported to give them interests in the settled property in respect of which they were disappointed by the election and had a claim to compensation.

Robert Booth, Ann Booth (the widow of John Booth), and the children of John Booth took under the will interests in the settled property of which they were disappointed by the election, but they had no interest under the settlement. They were therefore entitled to compensation, but no compensation could be claimed against them.

Joseph Longstaffe Booth, the heir of Thomas Booth, took a share under the settlement, but took no benefit under the will, and therefore was not bound to make any compensation.

The case now came on for further consideration.

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*George Lawrence*, for the trustees.

*Fischer Williams*, for Annie Booth (the testator's daughter). Mary Jane Robinson takes under the will one-ninth of F, and also of A, B, and C; she elects to take against the will, and thus takes one-fifth of F, G, H, and I. But G, H, and E are devised by the will to Annie Booth; Mary Jane Robinson must therefore out of the share she takes under the will in A, B, and C compensate A. Booth for her loss.

*Sheldon*, for Mary Jane Robinson and Francis Booth. All the parties elect to take under the settlement; there cannot be any compensation *inter se*.

[SWINFEN EADY J. I do not see why not. It is not a question of forfeiture. The persons who take against the will really take also the balance of the property given to them by the will after compensating those who are disappointed.]

Mary Jane Robinson loses a share in F, because Annie Booth elects to take under the settlement. The will purports to devise G, H, and E to Annie Booth, but she only takes E under the will.

[SWINFEN EADY J. Mary Jane Robinson is entitled to be compensated out of E for the loss of her one-ninth share of F. At the same time Annie Booth is entitled to be compensated for the loss of G and H to the extent of Mary Jane Robinson's share in A, B and C.]

*Rolt*, for Ann Booth (the widow of John Booth). Ann Booth takes nothing under the settlement. The will purports to give her one-ninth of F. Of this she is deprived by the election of Mary Jane Robinson, Annie Booth, and Francis Booth to take against the will; she is entitled to compensation out of all the interests which they take under the will. These parties are not entitled to compensation *inter se*, or at least are not entitled to claim it until the claim of Ann Booth is satisfied. She claims to be paid two-fifths of one-ninth of the value of F out of the other benefits which Annie Booth takes under the will, and two-fifths of the same one-ninth out of the other benefits which Mary Jane Robinson and Francis Booth take under the will. In every case any compensation they receive from each other must be included as a profit taken under the will.

*Charles Tennyson*, for Alfred Booth (the younger son of John Booth).

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*E. S. Ford*, for Joseph Longstaffe Booth.

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*Fischer Williams*, in reply. The only question really is whether Ann Booth comes first. The compensation which the parties take inter se is not taken as a benefit under the will. It is a personal claim for damages against the person disappointing them, to the extent of their disappointment. It is so described by Jessel M.R. in *Rogers v. Jones*. (1)

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SWINFEN EADY J. In the absence of authority, and on principle, I do not see how I can decide that this compensation is not a benefit received under the will within the doctrine of election. The doctrine is stated by Jessel M.R. in *Rogers v. Jones* (2) thus: "If a person whose property a testator affects to give away takes other benefits under the same will, and at the same time elects to keep his own property, he must make compensation to the person affected by his election to an extent not exceeding the benefits he receives."

In other words, so far as he receives benefit under the will, he must give effect to the testator's intention. I do not see how it can be said that this compensation is not a benefit received under the will. The title of the person who receives it begins with a bequest under the will. He obtains compensation instead of the property. In my opinion he must pay compensation out of all the benefits received by him under the will, including any compensation paid to him by any other beneficiary whose election to take against the will has disappointed him.

The order made in the summons contained the following declaration:—

"The said Mary Jane Robinson, Francis Booth and the defendant Annie Booth, spinster (being all the persons entitled under the surrender in the order of April 21, 1904, mentioned and also interested under the said will), by their counsel electing to take under the said surrender and against the provisions

(1) (1876) 3 Ch. D. 688; (1877) 7 Ch. D. 345, 350.

(2) 3 Ch. D. 689.

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in the said will contained, and it appearing that the said Ann Booth, widow, Robert Booth, Alfred Booth, and the four children (other than Francis Booth and Alfred Booth) of the said John Booth, deceased, are interested under the said will and are not interested under the said surrender. Declare that the said last mentioned persons are entitled to be compensated for the sums of which they have been deprived by the election aforesaid to the extent to which the said Mary Jane Robinson, Francis Booth and Annie Booth, spinster, take any benefits under the said will, and that such benefits include any compensation to which the said Mary Jane Robinson, Francis Booth and Annie Booth, spinster, are entitled inter se by reason of such election, and accordingly that the property taken by the said Mary Jane Robinson, Francis Booth and Annie Booth, spinster, under the said will, after paying thereout the proper proportion of the mortgage and debts and funeral expenses and costs hereinafter mentioned, ought to be applied in the first instance in making such compensation."

Solicitors: *Meredith, Roberts & Mills, for G. W. Jennings, Bishop Auckland; Tarry, Sherlock & King, for Trotter, Bruce & Loft, Bishop Auckland; Field, Roscoe & Co., for J. T. Proud & Son, Bishop Auckland; Crossman, Prichard & Co., for W. H. Oliver, Durham.*

J. R. B.



*In re* CRIGGLESTONE COAL COMPANY, LIMITED.

[No. 1 of 1906.]

*Company—Winding-up—Creditor's Petition—Assets covered by Debentures—Management of Company controlled by Debenture-holders—Debenture-holders' Action—Rights of unsecured Creditors—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 79, 91.*

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A creditor's petition for a winding-up order was opposed by debenture-holders, who had a floating charge on all the property of the company, and who had obtained the appointment of a receiver in an action to enforce their security, and by the company, which was under the control of the debenture-holders, on the ground that there were no assets available for the unsecured creditors :—

*Held*, that the onus was on the respondents to prove that there was no reasonable possibility of any benefit accruing to the unsecured creditors from the winding-up, and that unless that onus was discharged the petitioner was entitled to a winding-up order in order that the unsecured creditors might be represented by the official receiver in the proceedings in the debenture-holders' action.

Decision of Buckley J. affirmed.

*Per* Buckley J. : The Court has jurisdiction to make a winding-up order on a creditor's petition which is not opposed by the unsecured creditors if the order will be useful, not necessarily fruitful, and it is no answer that the debenture-holders will or may sweep up all the assets ; and the tendency of the Court since the passing of the Companies (Winding-up) Act, 1890, is not to refuse a winding-up order in such a case on the ground that there are no assets unless it sees that the petition is presented simply for the purpose of making costs.

*In re St. Thomas's Dock Co.*, (1876) 2 Ch. D. 116, and *In re Chapel House Colliery Co.*, (1883) 24 Ch. D. 259, discussed.

THIS was a petition for the compulsory winding-up of the Crigglestone Coal Company, Limited.

The petition was presented on April 4, 1906, by the British Insulated and Helsby Cables, Limited, who were creditors for 716*l.* 1*s.* 4*d.* for cables supplied to the coal company. The coal company was incorporated on January 7, 1895, under the Companies Acts, 1862 to 1890, and it had a paid-up capital of 70,000*l.* It had issued first mortgage debentures for 25,000*l.*, second mortgage debentures for 20,000*l.*, and third mortgage debentures for 40,000*l.* The third mortgage debentures had

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been issued at various dates from November 4, 1904, to December 18, 1905. The debentures constituted a floating charge on the present and future property of the company. The company was governed by a board of five directors, three of whom were debenture-holders, viz., Stewart, the chairman, holding 3000*l.* third debentures, Brotherton, holding 19,000*l.* third debentures, and Scholefield, who was a vendor, holding 1000*l.* first debentures. Down to 1903 the company paid dividends on its preference shares, but in that year great difficulty was experienced by the company in working the colliery owing to the existence of a large fault in the coal seams and to the temporary flooding of the mines. In the spring of 1904 the company's bankers, to whom the company was largely indebted, required for their satisfaction an inspection and valuation of the colliery by an independent mining engineer. Mr. Maurice Deacon was appointed to inspect the mines, and he made two written reports thereon dated July 14 and 25, 1904. These reports shewed that if the developments which he recommended were carried out and an expenditure of 30,000*l.* were incurred the colliery would produce a gross annual profit of 25,000*l.*, and the valuation put on the colliery by Deacon at the date of these reports was 165,000*l.* Brotherton and some others who were already largely involved in the undertaking found the money for these developments, and took third debentures in the company as security for their advances. On November 20, 1905, the order for cables which gave rise to the petitioners' debt was approved by the board, Brotherton being in the chair. The order was originally given to Messrs. Hirst & Sons, but by arrangement with them it was subsequently cancelled by Maddison, the managing director, who on December 5, 1905, gave the order to the petitioners. The petitioners delivered the cables to the company on December 20. Down to November, 1905, the company had been struggling on with money found by Brotherton, but at a board meeting held on November 27, 1905, it was reported that Brotherton was unable to provide any further money. Deacon, however, who had been appointed adviser to the board, agreed to find 1000*l.*, and on December 18 he received for that advance third debentures for 2000*l.* On December 15 Brotherton

advanced a further sum of 1500*l*. On December 28 the first mortgage debenture interest was paid, but the petitioners' debt was left unpaid. On January 8, 1906, the directors passed a resolution that the company should forthwith cease to carry on business. On January 9, 1906, a receiver and manager was appointed by the Court in a debenture-holders' action brought by the trustees for the first debenture-holders against the company and the other debenture-holders, the defendant company appearing by the same solicitors as the plaintiffs. By the judgment in the action dated February 20, 1906, the Court declared the rights of the debenture-holders, and directed the realization of the colliery. The property was advertised for sale by auction before the presentation of the winding-up petition, but the auction did not take place till afterwards, viz., on April 27, when the only bid was for 10,000*l*. The leases under which the company held the coal mines gave a right of re-entry to the lessors in the event of the winding-up of the company. The debenture-holders opposed the winding-up petition, upon the ground stated in the affidavit of the receiver and manager that the sale of the property would not produce sufficient to pay the debenture-holders in full, and would leave nothing for the ordinary creditors, whereas a winding-up order, even if it did not lead to an immediate entry by the lessors, would render it impossible to sell the colliery, and would seriously prejudice the debenture-holders' security.

The petition came on for hearing before Buckley J. on April 25, 1906.

*H. E. Gardner*, for the petitioning creditors, cited *In re Chic, Ltd.* (1), and *In re Alfred Melson & Co., Ltd.* (2)

*Buckmaster, K.C.*, and *H. M. Humphry*, for the first debenture-holders, opposed the petition, and cited *In re St. Thomas's Dock Co.* (3); *In re Chapel House Colliery Co.* (4)

*Baden Fuller*, for the second and third debenture-holders, and *Manson*, for the company, also opposed.

*Cur. adv. vult.*

(1) [1905] 2 Ch. 345.

(2) [1906] 1 Ch. 841.

(3) 2 Ch. D. 116.

(4) 24 Ch. D. 259.

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May 22. BUCKLEY J. This is a colliery company. The petitioners are creditors in respect of a debt of 716*l.* for electrical cables supplied on December 20, 1905, under an order given on December 5, 1905. They are unpaid, and ask for a winding-up order. The debt and the insolvency are both admitted. The petitioners are opposed by debenture-holders, on the sole ground that there are no assets for unsecured creditors, and that the debenture-holders' security may be affected by a winding-up order, inasmuch as the company's lessors will in that case have power to re-enter. The company appears by counsel, but has taken no substantial part in the argument, having, indeed, no interest in the matter. On January 8, 1906, the directors passed a resolution that the company should forthwith cease to carry on business. It has done so, and under a writ issued on January 9 in a debenture-holders' action, in which Stewart, the chairman of the company, and two others as trustees for the first debenture-holders are plaintiffs, a receiver and manager has been appointed. The debenture-holders say (and that, I regret to say, is the law) that they, as the owners of a floating charge upon all the present and future property of the company, are entitled to the goods which the petitioners supplied, and are not (as again is the law) liable to pay for them. They say that the company's leases contain powers in the lessors to re-enter if a winding-up order is made, that consequently a winding-up order might injure the debenture-holders, and that the unsecured creditors, therefore, ought not to have such an order. The short history of the company is as follows. [His Lordship stated the facts substantially as above set out, and continued:—] Upon this state of facts I have to consider whether the petitioners are entitled to an order. I will state shortly what I take to be the law. First, as between the creditor and the company, who are his debtors, the unpaid creditor who shews insolvency is entitled *ex debito justitiæ* (as it is generally termed) to a winding-up order—that is to say, to an order by virtue of which the creditor, by the hands of a liquidator, is entitled to seize the assets of his debtor and administer them for the payment of himself and other creditors. In *Bowes v. Hope Life Insurance and Guarantee Co.* (1)



are to be found the oft-quoted words of Lord Cranworth upon the subject, where he qualifies this right only by the words "One does not like to say positively that no case could occur in which it would be right to refuse it." The words of Lord Cranworth are supported by the very high authority of Lord Selborne in *In re Western of Canada Co.* (1) and repeated by Sir George Jessel in the same case. (2) This right of the unpaid creditor may be called, as Lord Bowen called it in *In re Chapel House Colliery Co.* (3), a right to equitable execution. A creditor who obtains judgment, and issues execution at law, has a legal right to the means of satisfying his judgment. Subject to qualifications, one of which rests in the fact that the language of the Act is "may" and not "shall," and to the reservation which Lord Cranworth made, and subject to what I shall presently say as to the representative position of the petitioner, it seems to me that the petitioning creditor has, as between himself and his debtor, a similar right *ex debito justitiæ* to seize his debtor's assets by the hand of a liquidator and administer them for the benefit of his class. There are cases in which such an order has been refused on the ground that there were no assets to seize. In my judgment this is no exception to or qualification of the right. It is only affirming that if there are no assets the rule does not apply. If the right is to seize the debtor's assets by the hand of a liquidator, it is no exception to say that there is no such right when there are no assets. There cannot be a right to seize nothing. This so-called exception, therefore, is not an exception to the rule, but a statement that under these circumstances there is nothing upon which the rule can operate. Subject to the foregoing, I think that, as between the creditor and the company as his debtor, the creditor who proves insolvency is, without exception, entitled *ex debito justitiæ* to a winding-up order.

But then comes another consideration, viz., that the order which the petitioner seeks is not an order for his benefit, but an order for the benefit of a class of which he is a member. The right *ex debito justitiæ* is not his individual right, but his

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(1) (1873) L. R. 17 Eq. 1, 6.

(2) L. R. 17 Eq. 7.

(3) 24 Ch. D. 269.

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representative right. If a majority of the class are opposed to his view, and consider that they have a better chance of getting payment by abstaining from seizing the assets, then, upon general grounds and upon s. 91 of the Companies Act, 1862, the Court gives effect to such right as the majority of the class desire to exercise. This is no exception. It is a recognition of the right, but affirms that it is the right not of the individual, but of the class; that it is for the majority to seek or to decline the order as best serves the interest of their class. It is a matter upon which the majority of the unsecured creditors are entitled to prevail, but on which the debtor has no voice.

The views as to the rights of the petitioning creditor which I have thus endeavoured to express are, I believe, consistent with all the authorities. The company will often put forward, as if it were matter of defence, that there are no assets to wind up. It is not matter of defence at all. The Court has often refused an order upon that ground, but not because it lies in the debtor's mouth to say that he is not amenable to the jurisdiction because he has no property, but because the Court does not make an order when no benefit can result. If the order will be useful (not necessarily fruitful) there is jurisdiction to make it. This view is illustrated by the fact that in many cases, and particularly since the Act of 1890, the Court will make an order, not because there are assets, but in order to provide the machinery for ascertaining whether there cannot be shewn to be assets. *In re Krasnapolsky Restaurant and Winter Garden Co.* (1) is an illustration of this.

The tendency of the Court to refuse an order on the ground that there are no assets has been largely modified by the fact, which I learned upon inquiry at the Companies Winding-up Office soon after I had to take part in the conduct of this business, that a winding-up order under those circumstances does not do material harm. Under r. 186 of the Companies Winding-up Rules, 1903, the official receiver is not to proceed actively in the winding-up if there are not assets. The only real danger is lest petitions should be presented simply for the purpose of making costs where there is really nothing to wind

(1) [1892] 3 Ch. 174.

up—a danger against which the Court is strong enough to defend itself. An order when there is nothing at all to wind up may at times be justified as the means of bringing to an end a vicious career. I do not regard any of the cases which have been referred to as inconsistent with that which I have laid down. In *In re St. Thomas's Dock Co.* (1) and *In re Chapel House Colliery Co.* (2) the contest lay, not between the unsecured creditor and the debtor, nor between the unsecured creditor and the secured creditors, but between one secured creditor and others of the like class. A mortgagee is, of course, entitled to pursue all his remedies at once, and in the *St. Thomas's Dock Case* (1) the debenture-holder had served the statutory notice for his unpaid debenture interest, and was no doubt pursuing his remedy as a general creditor, although he also held security. But the ground of the decision was that the company had a going business, and that a large majority of the class of which he was a member thought they had a better chance of obtaining payment if an order were not made. The same was the position in the *Chapel House Colliery Case* (2), with the addition that in that case, not the secured creditors only, but the unsecured also, opposed. There are in the judgments in that case of Cotton L.J. and Bowen L.J. expressions which, read apart from their context, and in forgetfulness of the facts of the case, may seem to mean that an order ought to be refused unless the petitioner shews that money will result to him from the making of it. But that is not, in my judgment, their real meaning, and subsequent authorities have not treated that as being their meaning. The Court of Appeal was dealing with a petitioner who was met with such an opposition as I have described, and the Lords Justices were addressing themselves to the question of the remedy to which, under those circumstances, he was entitled. Vaughan Williams J., I think, certainly so understood it. If not, he could not have decided *In re Krasnapolsky Restaurant and Winter Garden Co.* (3) as he did, and in *In re Edgbaston Brewery Co.* (4) he would have had a much shorter answer to the petition than that which he gave. He there points to the consideration that if an order is refused

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(1) 2 Ch. D. 116.

(2) 24 Ch. D. 259.

(3) [1892] 3 Ch. 174.

(4) (1893) 68 L. T. 341.

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friends of the company might come forward, or a reconstruction scheme might be started, which would give the creditors a chance of getting something, and that the wishes of the majority ought to be regarded, arguments to which there would have been no occasion to resort if the short answer was that there were no assets and there could, therefore, be no order.

The outcome of it, therefore, in my opinion, is that it is no answer, as between the petitioner and the company, that the debenture-holders will or may sweep away all the assets. As between the creditors and the company, the former are entitled to seize and administer so as, if possible, to escape that result. Is it, then, an answer as between the petitioner and those who appear to oppose this petition? The parties who have given notice to appear, and who do appear before me to oppose this petition, are the following: Stewart, the chairman of the company, holding 3000*l.* third debentures; Brotherton, a large shareholder and a director, holding 19,000*l.* third debentures; Moulton, holding 20,000*l.* second debentures; and Chalker, a solicitor, and the partner of Stewart, holding 600*l.* first debentures. Brotherton is also an unsecured creditor, but he has not given notice to attend, and is not appearing, in that character. He opposes in the character of a debenture-holder. His case is that, as an unsecured creditor, he has no interest. As between the petitioners and the debenture-holders who thus appear to oppose, the matter seems to me to stand in this position. The debenture-holders are not members of the class on whose behalf the petitioners apply to the Court. They are persons who claim to stand as mortgagees outside of and before the petitioners' class, and who say that the petitioners are without a remedy because they, the debenture-holders, rank before them. They are for all purposes the petitioners' opponents, and not members of the class that they represent. In determining what the petitioners' rights are, the Court ought, I think, to disregard the fact that a different course may be more advantageous for the mortgagees. There is a debenture-holders' action. In that action the defendants, the company, are in no way interested. The unsecured creditors are, or may be. They are interested in the



accounts to be taken of what is due upon the debentures, and the question, if there be a question, whether the debentures were bona fide issued for value and in a course of honest trading, looking at the circumstances of the company and its current liabilities at the time. They are interested in the terms upon which, and the circumstances under which, the property shall be realized. If I make a winding-up order, the unsecured creditors, by the official receiver, will in fact control the defence in that action. This is a real advantage, to which they are, I think, entitled. Beyond this, I think that the unsecured creditors are entitled to investigate the circumstances under which the company, between November, 1904, and December, 1905, obtained further moneys and issued further debentures to the extent of 40,000*l.*, depending for its daily existence upon the willingness of Brotherton and others to find further money. It is, no doubt, an important circumstance to be borne in mind that the leases contain powers of re-entry in case an order is made. There is, however, no evidence that the lessors will avail themselves of that power. On the contrary, such evidence as exists is to the effect that the lessors are willing to give assistance in selling the property. If the debenture-holders were really pressed with anticipations of danger from a winding-up order, they would, I think, shew greater disposition than they do to meet what is the certainly not unreasonable desire of the petitioners to be paid; and if, contrary to my opinion upon the evidence, there is danger to the debenture-holders' security if an order is made, it is a fair answer to them that they elected to accept a security upon the property of a company which had by contract given to its lessors a right of re-entry in that event, and that it does not lie in their mouth to say that their debtor must, therefore, for their benefit be relieved from the legal consequences which result in favour of other creditors from incurring debts and not paying them. I may add that this is a fortiori true when in substance, though not in form, it was the debenture-holders who for their own purposes, although in the name of the company, incurred the petitioners' debt.

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The result is that, in my judgment, neither the company, who

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are the debtors, nor the debenture-holders, who are their incumbancers and the persons by and for whom this business has for some time past been carried on, are entitled to stay the hand of the Court in giving to the company's unpaid creditor his statutory remedy—his right to seize and administer, by the hand of a liquidator, for the benefit of himself and others of his class, such assets as he can reach by the operation of a winding-up order and the consequential rights which will flow from it under the Act of 1890. I therefore make a compulsory order.

His Lordship declined to stay execution pending an appeal.

F. E.

C. A.        The first debenture-holders appealed. The appeal came on for hearing on May 31, 1906.

*Buckmaster, K.C.*, and *H. M. Humphry*, for the appellants. This petition was opposed, first, because the assets were not sufficient to pay the first debenture-holders; and, secondly, because the pendency of the petition was prejudicial to the realization of debenture-holders' security. Buckley J. made an order on two grounds. First, he thought that, there being no real defendant in the debenture-holders' action, the presence of the liquidator in that action might be an advantage; but it is not suggested here that there is any need for investigation with regard to the circumstances under which the debentures were issued. Secondly, he was shocked at the results which followed from the powers held by the debenture-holders in this case; but it is not the business of the Court to consider any hardship arising from the exercise of indisputable legal rights unless it has the power to stop it. The hardship arises from the rights given by these floating securities, and if that is to be altered it must be altered, not by the Court, but by the Legislature.

[ROMER L.J. I do not like the company's name being used as a going concern when the company has really come to an end.]

The company's name has no commercial value: it is the receiver to whom the creditors are looking. On no hypothesis can the winding-up order result in any benefit to the unsecured

creditors, and therefore the order ought not to be made: *In re St. Thomas's Dock Co.* (1); *In re Chapel House Colliery Co.* (2)

[COZENS-HARDY L.J.: *In Bowes v. Hope Life Insurance and Guarantee Co.* (3) Lord Cranworth speaks of the right of an unpaid creditor to a winding-up order as *ex debito justitiæ*.]

That dictum has been modified by the later cases, which shew that the Court will not make a winding-up order where there are no assets which can be got in by the winding-up. *In re Edgbaston Brewery Co., Ltd.* (4), is another case depending on the same principle. *In re Krasnapolsky Restaurant and Winter Garden Co.* (5) leaves unaffected the principle of the cases above cited, but the Court there thought that the question of fact, viz., that there were no available assets, was not established.

*Younger, K.C.*, and *H. E. Gardner*, for the respondents, the petitioners. The judgment of Buckley J. is not only warranted by the authorities, but it can be justified on the facts of this case. The evidence does not establish that there is no reasonable possibility of any advantage accruing to the petitioning creditors from a winding-up.

[They were stopped.]

COLLINS M.R. This case appears to me to depend on the truth of the appellants' assertion that in no possible case could the petitioners gain any benefit from a winding-up order. Is there any possibility of the creditors reaping any fruits out of it? It seems to me that the onus is clearly on the debenture-holders to negative that possibility. They are met to start with by the proposition affirmed by the House of Lords that *prima facie* the right of a creditor who cannot obtain payment of his debt to obtain a winding-up order is *ex debito justitiæ*. Certain exceptions are engrafted on this rule, but, as Buckley J. pointed out, they are of a very special character, and are not really exceptions, but depend upon this consideration, that the Court will not give the creditor the right to seize the company's assets by the hand of the liquidator when there are no assets to seize. If there is

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(1) 2 Ch. D. 116.

(2) 24 Ch. D. 259.

(3) 11 H. L. C. 389, 402.

(4) 68 L. T. 341.

(5) [1892] 3 Ch. 174.

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a reasonable probability, or even a reasonable possibility—I think it may be put as high as that—that the unsecured creditors will derive any advantage from a winding-up, the order ought to be made in order that they may be heard in the debenture-holders' action, and not have the proceedings left in the hands of other persons who are antagonistic to their interests. In my opinion the judgment of Buckley J. is perfectly right, and this appeal fails.

ROMER L.J. I am of the same opinion. If it was proved that no possible benefit could accrue to the unsecured creditors I should agree with the appellants that a winding-up order ought not to be made, especially as the winding-up order might possibly give the landlords of the colliery rights which might be used prejudicially to the appellants' interests; but it is for those who oppose the petition to satisfy the Court that no possible good could accrue to the petitioners from a winding-up order. Buckley J. came to the conclusion that some good might result, and on looking into the evidence I am not satisfied that if someone is appointed to represent the unsecured creditors in the debenture-holders' action and look after their interests there might not eventually be some surplus coming to them. As Buckley J. pointed out, they are interested in the accounts to be taken of what is due on the debentures. They are also interested in seeing whether any of the debentures can be attacked, although I do not suggest that any case has been made out for attacking them. But I rely particularly on the following remarks of Buckley J.: "They are interested in the terms upon which, and the circumstances under which, the property shall be realized. If I make a winding-up order, the unsecured creditors, by the official receiver, will in fact control the defence in that action. This is a real advantage, to which they are, I think, entitled." As matters stand, for the reasons I have pointed out I think it may well be that if this company is wound up and the unsecured creditors are represented by the official receiver in the debenture-holders' action some good may result to the petitioners. I cannot say that it is hopeless. I therefore think that this appeal fails.



COZENS-HARDY L.J. I am of the same opinion. I think that the Court ought not to be astute in endeavouring to support the contention that there is no possibility of any surplus being got for the unsecured creditors. I say this partly for the credit of the directors, whose honesty I assume. In December last they acted in the belief that this was a company which had a future before it. They had themselves put in evidence two reports of a highly-skilled expert, who said that if 30,000*l.* were spent upon the property it would produce a gross annual profit of 25,000*l.*, and who valued the property at that time at 165,000*l.* The directors themselves put forward those reports; they do not venture to say that they have reason to believe that they are inaccurate; they acted on the footing that they were true so late as last December; and for their credit I say that it scarcely lies in their mouths to say that no winding-up order can be made because there can be no assets for the unsecured creditors. Speaking for myself, I attach great importance to a winding-up order in the case of a company which has issued debentures of this kind, giving a floating charge on all the property of the company. Anything more unsatisfactory than leaving the affairs of the company in the hands of the debenture-holders alone I cannot imagine.

Solicitors: *Rawle, Johnstone & Co., for Hill, Dickinson, Dickinson, Hill & Roberts, Liverpool; Gribble, Oddie, Sinclair & Johnson, for Stewart & Chalker, Wakefield.*

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June 26, 28;  
July 2, 3.

*In re* PARDOE.McLAUGHLIN *v.* PENNY.

[1904 P. 2346.]

Appeal from a decision of Kekewich J., [1906] 1 Ch. 265, allowed on the facts.

APPEAL from a decision of Kekewich J. (1)

In this case the plaintiff asked for a declaration that the estate of George Pardoe, deceased, was liable to replace certain moneys forming part of the estate of J. F. Croome the younger.

The defendants alleged that Elizabeth Pardoe (the wife of George Pardoe, deceased), who was entitled to a moiety of the estate of J. F. Croome the younger, had validly appropriated these sums towards satisfaction of her moiety, and had paid over the sums so appropriated to her husband, and he also pleaded the Statute of Limitations.

Kekewich J. held (1.), upon the evidence, that there had been no valid appropriation; (2.) that the Statute of Limitations did not apply. His decision is reported on the second point only.

The defendant Arthur Penny appealed from this decision on both points.

*Upjohn, K.C., Ingpen, K.C., and P. M. Walters*, for the appellant.

*Levett, K.C., and Cann*, for the respondent.

The Court of Appeal reversed the decision on the first point, and therefore the second point did not arise.

Solicitors: *Walters & Co., Charles Sawbridge & Son.*

(1) [1906] 1 Ch. 265.

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[1905 G. 1272.]      •

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*Will—Construction—Gift to Children as a Class—Children of deceased Child—Substitutional or Substantive Gift—Issue of Parent dead at Date of Will—“Shall die”—Words of Futurity.*

A testator gave legacies to the children of A., one of his sons, referring to him as “my deceased son”; he gave a legacy and annuity to another son R., as to whose whereabouts he was ignorant; he then gave the residue of his estate “In trust for all or any my children or child (other than the said R.) who shall be living at my death” and attain twenty-one or marry, “provided that in case any one or more of my children or child (other than the said R.) shall predecease me, leaving any child or children living at my death, then such child or children of my deceased child (other than the said R.) shall take” the share which his or their “parent would have taken if such parent were living at my decease”:

*Held* (reversing the decision of Joyce J., [1906] 1 Ch. 319, and dissentiente Romer L.J.), that the children of the son A. were entitled to share in the residue though A. was dead at the date of the will.

*Loring v. Thomas*, (1861) 1 Dr. & Sm. 497, discussed; and held, *per* Vaughan Williams L.J., that the principle of that decision applied, and *per* Romer and Fletcher Moulton L.JJ., that it did not.

APPEAL from a decision of Joyce J. (1)

As the material portions of the will and the facts are fully set out in the report of the case in the Court below, the following summary will be sufficient to make the arguments and judgments intelligible:—

Richard Gorrington, the testator, who died in April, 1905, by his will of July, 1898, after giving legacies amounting altogether to 1300*l.* to four of the children of his son Alfred, whom he referred to as “my deceased son,” and an annuity and a legacy to another son Richard, as to whose whereabouts he was ignorant, devised and bequeathed the residue of his estate to his trustees upon trust for conversion, directing them to stand possessed of the trust premises “In trust for all or any my children or child (other

(1) [1906] 1 Ch. 319.

C. A. than and except the said Richard) who shall be living at my  
 1906 death " and attain twenty-one or marry in equal shares. " Pro-  
 GORRINGE, vided that in case any one or more of my children (other than  
*In re.* the said Richard) shall predecease me leaving any child or  
 GORRINGE children living at my death, then such child or children of my  
*r.* deceased child (other than the said Richard) shall take, and if  
 GORRINGE. more than one in equal shares, the share which his, her or their  
 parent would have taken if such parent were living and over the  
 age of twenty-one at my decease."

The testator left eight children surviving.

The son Alfred, who predeceased the testator, had five children living. The amount of the residue was large, and it was stated that the share which the children of Alfred would take, if held entitled under the proviso in the will, would be about 15,000*l*.

Joyce J. held that the children of Alfred were not entitled to share in the residue.

The children of Alfred appealed.

*Badcock, K.C.*, and *Fildes*, for the appellants. The son Alfred does not come within the first part of the residuary gift as a son "living at my death," but the subsequent proviso is in general terms, and is wide enough to include Alfred's children: the words are any of "my children" not "my said children" or "such children." What is given to these grandchildren is the share which Alfred "would have taken" if he were living at the testator's death: it is not a substitutionary gift, as in *Christopherson v. Naylor* (1); it is a substantive gift, and is covered by the decision in *Loring v. Thomas*. (2) The words "shall predecease me" are equivalent to "shall be dead" or "shall have predeceased me," and "shall" is not a word of futurity in this will. The words "shall die" do not necessarily import futurity: *In re Chapman's Will* (3); *In re Woolrich*. (4)

[FLETCHER MOULTON L.J. referred to *West v. Orr*. (5)]

The words in that case were any of "such children"; if these were the words in the present will, the case would be unarguable. The learned judge in the Court below was wrong in

(1) (1816) 1 Mer. 320.

(3) (1863) 32 Beav. 382.

(2) 1 Dr. & Sm. 497.

(4) (1879) 11 Ch. D. 663.

(5) (1878) 8 Ch. D. 60.



distinguishing this case from *Loring v. Thomas* (1), and the appeal should be allowed. [They also referred to Hawkins on Wills, p. 249.]

*Norton, K.C.*, and *Waggett*, for one of the testator's sons. The words "shall predecease me" are words of futurity, and include only the case of a child dying after the date of the will, and this construction of "shall" as a word importing futurity should be adopted in this will, not only because it is the natural meaning of the word, but because the testator, by referring to Alfred as my "deceased son," shews that the death of Alfred was a fact present to his mind when he used the words "shall predecease me." *Loring v. Thomas* (1) lays it down that in these cases it is a question of intention, and the intention shewn on this will is that the children of the deceased son Alfred were not to take. Further, the principle of *Loring v. Thomas* (1) has never been applied to the case of a testator dealing with his own children; it is applied only in the case of remote relations, when the testator may very well be ignorant whether they are living or dead at the time he makes his will. *Waugh v. Waugh* (2) is in favour of the view we ask the Court to take; true, that decision had been disapproved of in *Tytherleigh v. Harbin* (3), but it has been said it could always be supported on the ground of the evident intention of the testator: *Loring v. Thomas*. (4) The present case is distinguishable from *Loring v. Thomas*. (1) In that case the gift was to all the children, not to the children who shall be alive at a named time; it was a gift to distant cousins, and not to children. The son Alfred never could come within the gift to this class of children; he was dead at the date of the will, the testator knew this fact, and did not intend Alfred's children to share in the residue.

*In re Chapman's Will* (5) is distinguishable, the testator there was not dealing with his own children, but with nephews and nieces, and the same distinction can be made in *In re Woolrich*. (6) The intention expressed by this testator is clear: he has defined his children who are to take as being his

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(1) 1 Dr. &amp; Sm. 497.

(2) (1833) 2 My. &amp; K. 41.

(3) (1835) 6 Sim. 329.

(4) 1 Dr. &amp; Sm. 522.

(5) 32 Beav. 382.

(6) 11 Ch. D. 663.

C. A. children living at his death, except Richard, and it is only  
 1906 the children of these children who are to take by substitution  
 their parent's share.  
 GORRINGE, *In re.* Hughes, K.C., and A. Adams, for three of the testator's  
 GORRINGE daughters, adopted this argument.  
 GORRINGE *r.* Badcock, in reply.

*Cur. adv. vult.*

July 6. VAUGHAN WILLIAMS L.J. On the whole I think that this appeal ought to be allowed. I should not have differed from the construction put by Joyce J. on this particular will if it had not been that it seems to me that in effect Joyce J., by his judgment in the present case, is really departing from a principle of construction which has been frequently acted on since the decision of Kindersley V.-C. in *Loring v. Thomas*. (1) I am quite aware that the decision in *Loring v. Thomas* (1) shews that the question whether you shall give to the word "shall" in a particular will the meaning of futurity which that word naturally imports is, in each case, a question of the intention which is to be found in the particular will: but it does seem to me that *Loring v. Thomas* (1) also shews this, that, in the case of a legacy to grandchildren following a previous legacy in a will to some of the children, one ought not to insist upon adopting the *prima facie* meaning of futurity involved in the use of the word "shall" if the result of so doing will be to exclude some of the grandchildren of the testator with whom it may be supposed he is likely to deal on an equality. I am not forgetting that in *Loring v. Thomas* (1) the testator was not the grandfather or the grandparent of the children in question, but was dealing with the children and grandchildren of his relatives.

I will now try to express my view as to the application of *Loring v. Thomas* (1) in the present case. In my opinion the object of the testator in this proviso, when he said that the "child or children of my deceased child shall take their parent's share," was not to limit the number of takers under the words "Provided that in case one or more of my children shall predecease me leaving any child or children living at my death,"

(1) 1 Dr. & Sm. 497.

but to fix the amount of their share. If so, it is immaterial whether a child, Alfred, died before or after the date of the will, for his children will take a substantive, and not a substitutionary, gift.

The main objection to this construction urged in the present case is, as it was in *Loring v. Thomas* (1), that the words "shall predecease me" are words which are words of futurity, and can only include the case of a child dying after the date of the will, and not the case of a child dying, as Alfred did in the present case, before the date of his father's, the testator's, will: and it is said that this construction of "shall" as a word importing futurity is to be adopted in the case of the present will, not only because it is the natural meaning of the word "shall," but because the testator, by the mention in the earlier part of the will of the predecease of Alfred, shews that the predecease of Alfred was present to his mind when he used the word "shall." I cannot myself think that the mention by a father in his will of the fact of the predecease of a grown-up son who had married and left children emphasizes to any appreciable extent the presence to the father's mind, at the time of making his will, of the fact of the death of such a son. There can, of course, be no doubt but that the words "shall predecease" may be construed, not as pointing to a future death, which is their strict grammatical import, but as pointing to the event of being dead at a certain future period without reference to the particular time at which the death may have occurred: see *Loring v. Thomas* (2); and especially would this seem to be the case where the words "shall predecease" are coupled with conditions which in their nature are necessarily both future and contingent, such as the conditions introduced by the words "leaving any child at my death." The words "in case," in my opinion, rather point to a hypothetical case, and to my mind favour the adoption of the construction put by Kindersley V.-C. on like words in *Loring v. Thomas*. (1)

The case of *Christopherson v. Naylor* (3), although quoted, and properly quoted, as not quite in accord with the view taken

(1) 1 Dr. & Sm. 497.

(2) 1 Dr. & Sm. 513.

(3) 1 Mer. 320.

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by Kindersley V.-C. in *Loring v. Thomas* (1), at least shews that Sir William Grant took the view that the words "shall die" did not necessarily import futurity. The departure from the natural construction of the word "shall" which was adopted by Kindersley V.-C. in *Loring v. Thomas* (1) has frequently been adopted since in cases like the present, owing to the disinclination of the Courts to exclude the children of a deceased child, and the Courts have laid hold of slight expressions as a sufficient ground for avoiding such a construction; and, in my opinion, if one was to adopt the grounds suggested by Joyce J. here for not applying the principle of *Loring v. Thomas* (1), one would in effect be overruling a principle of construction which has frequently been acted on ever since that decision, viz., that in construing a will one may, if the will as a whole justifies it, depart from the more natural meaning of the word "shall," a principle which has, in my opinion, saved the Courts again and again from defeating the obvious intention of the testator.

Prima facie it is probable that a testator would wish to treat all his grandchildren with equality. In my opinion, notwithstanding the legacies amounting to 1300*l.* to four of Alfred's children, the testator would, in the present case, be treating Alfred's children less favourably than the children of his other children if these children were excluded from any share in the residue. It was perfectly easy to express this exclusion in clear words if that had been the intention of the testator; and if such had been his intention, surely he would have done so. The will itself shews that the testator well knew how to express an exclusion from a class upon whom he was conferring benefits when he really intended so to do.

I think, although I have the greatest respect for the opinion of Joyce J. on such a question as this, that this appeal ought to be allowed.

ROMER L.J. In the case of a will like this I think all will agree that it is one upon which it is not surprising that even lawyers should differ with regard to its true meaning and effect.



For myself I have come to the conclusion that the construction put upon this will by Joyce J. was correct. I will proceed to give my reasons for the opinion I have so formed, but before proceeding to deal with the provisions of this will at all in detail I wish to make a few preliminary observations.

In construing a will what I like to do is, before going to the authorities, to read the will itself carefully, and to see whether, apart from authorities, I cannot gather what the meaning of the testator was. Of course, in construing the will I must bring in aid all those rules of law and construction which the authorities have laid down; but if in doing so, and construing the will for myself, I come to one conclusion, I do not think it is a wise or right thing to attempt to construe one will—a will like this—by the determination put by a judge on another will, merely because that other will is something like the present. No doubt it is tempting, if you find a will something like the will you have to construe already construed by a judge, to start with the assumption that the first decision was right (which is a right assumption), and then to proceed to see how the will differs, and then to consider each difference in detail and to see whether that difference ought to lead you to a different conclusion from that arrived at by the judge in the prior case. To my mind such a method of procedure often leads to a very erroneous conclusion as to a will taken as a whole.

I have made those preliminary observations because counsel for the appellants have argued that the present will is governed by a decision of Kindersley V.-C. in the case of the will which he had to construe in *Loring v. Thomas*. (1) Now, so far as any principle was laid down by the Vice-Chancellor in that case, I willingly adopt it; but I am not prepared to discuss the present will by the method of taking the differences—and there are several—between the present will and the will in *Loring v. Thomas* (1), and considering whether each of them is sufficient in itself to differentiate the present will in its effect from the will in *Loring v. Thomas*. (1) The only principle that I find in *Loring v. Thomas* (1) and the cases which have

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followed it is a principle with which I am heartily in accordance, and it is this : that where you have gifts by will to beneficiaries with provisions for the case of the death of those beneficiaries in some such words as these, "In case any of the beneficiaries shall die," followed by a provision for issue, those words *prima facie* point to futurity, but they may refer to the past, and words of that kind are often used by testators not intending to restrict them to the future, but to include the past ; and accordingly the *prima facie* effect of the words may easily be departed from if, when you look at the will as a whole, you come to the conclusion that in the will in question the testator used an expression which he intended to cover the larger view. In *Loring v. Thomas* (1), if you look at it carefully, and see the careful way in which the Vice-Chancellor dealt with the special provisions of that will, you will see that he himself pointed out the difficulty caused by the word "shall" as indicating futurity, and that he examined the will in detail in order to see whether the word used in that will had its *prima facie* meaning or the more extended meaning ; and he came to the conclusion upon that will as a whole that the testator had used the words intending them to have their larger meaning. But beyond that it appears to me that it is not only not useful, but it is absolutely mischievous, to attempt to construe the present will by reference to the will in *Loring v. Thomas* (1) ; especially, as I shall point out when I come to deal with the present will, since the will in *Loring v. Thomas* (1) differed in many respects, to my mind important respects, from the present, and certainly differed from the present will taken as a whole.

Now, with those preliminary observations I pass to the present will. I first notice a gift of certain legacies to four children of a son who was dead at the date of the will, and I gather that the motive of the gift was the fact that they were the children of a deceased son, for in the will he pointedly mentions, with regard to those legatees, that they were children of his deceased son Alfred. I next find that he deals with the case of a son Richard, and he proceeds to give him a certain legacy and an annuity. I gather from this will that, with regard to that son Richard, the testator was not

(1) 1 Dr. & Sm. 497.

absolutely certain whether he was living or dead. The reason why I say that is because I find that with regard to him the testator said, "And whereas I am ignorant of the residence or whereabouts of my said son Richard"; and he made a provision that if that son did not communicate with his executors within three years after his, the testator's, death, then he should not have the legacy or the annuity.

I pause there to consider this: suppose now the testator is going to deal with his residue, and intends to make provision for his children or their issue, at least it is equally probable—just as probable as the other view—that when he came to deal with his residue he would provide for his living children whose existence he knew of, and not for the children of Alfred, or for Richard or his children. On the other hand, of course, he might wish when he comes to deal with his residue to make provisions for children or issue, so as to include the children of those two sons Alfred and Richard. The question which is the correct view would depend upon the words of the residuary gift; but there is no *prima facie* reason for supposing that he would intend one view rather than the other. Now if, when you come to the gift of the residue, you find that of the two views the one is strictly in accordance with the language used, and is consonant with the whole of the residuary gift, while if you take the other you do not adopt the *prima facie* language used, but have to adopt another view of it, of the two you would then take the first view and not the second: but that view, to my mind, would be greatly strengthened if you found, in addition, that if you adopted the second view you had to explain away expressions used by the testator which it is difficult, if not impossible, to suppose he could have used if he had intended that point of view.

With those observations I now pass to the residuary gift. Having provided for the children of a deceased son, and for the son about whom he was not sure where he was, or whether he was living or dead, let us see what the trusts of the residuary gift are. If one reads the trusts through, all I need say in starting is this, that the language used applies throughout, without the slightest difficulty and in its natural meaning, to the view that

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he was intending to provide for his own children that he knew were living, and their issue. Let us look at the words: the first trust is, "In trust for all or any my children or child (other than and except the said Richard) who shall be living at my death and being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or marry under that age and if more than one in equal shares." That, I may point out, is certainly the main gift, for the gift to the issue, whether it is substitutionary or not, is headed by a proviso, and I think it is fairly open to the observation that his main gift was in his first words. He must have contemplated in the main gift that only those children should have a chance of taking who were living at the date of his will, and, in order to prevent any doubt with regard to the son Richard, he expressly excepts him from the provisions of the gift. To my mind he did not except Alfred, because he knew, as he pointed out, that Alfred was already dead, and he provided for some of his children.

Then comes this proviso—and it is a proviso, "Provided that in case any one or more of my children (other than the said Richard)"—now, again, he has to except Richard, for he is not certain whether he is living or dead,—“shall predecease me leaving any child or children living at my death then such child or children of my deceased child (other than the said Richard) shall take and if more than one in equal shares the share which his, her or their parent would have taken if such parent were living and over the age of twenty-one years at my decease”: that is to say, in form it is substitutional in this sense, that he expects they are to take what their parent, if living at his decease and over twenty-one, would have taken. That shews in itself that he was referring to his prior gift, which was a gift to the living children at the date of his will, and was providing for the case of their issue if those children died in his lifetime. That is, to my mind, the natural meaning of the words on the language used, and there is absolutely nothing, to my mind, in this will which enables the Court to depart from the natural and first meaning of the words used.

Now take the opposite point of view, and see the difficulties which arise: you not only have the words “in case any one or



more of my children shall predecease me"—pointing to futurity—but you also have the words "in case," which are not to be forgotten, in the words "in case any one or more of my children shall predecease me"—purely hypothetical in its form; and you have to violate that *prima facie* meaning of these words in order to give it the larger construction. But further, as I have indicated before, in this will you have an expression used which it is almost inconceivable, to my mind, that the testator could have used if he really had contemplated the case of the children of Alfred taking, because he says, "in case any one or more of my children shall predecease me." Think of the words the testator is using when he says "in case any one or more of my children shall predecease me," speaking of his own children, when he knew, as the will shews, that Alfred was dead already; is it reasonable to suppose on this will that he could have used this expression if he had intended by this gift to refer to Alfred under the words "in case any one or more of my children shall predecease me?"

To my mind, as I have pointed out, the alternative point of view in this will departs from the *prima facie* meaning of the will without any justification, and does violence to the language used.

For these reasons I am of opinion that on this will the testator meant what he said, and only what he said, and that he did not intend to provide for the children of Alfred, or for the children of Richard, but intended to carry out what, as I have indicated, he well may have meant, and probably did mean, even apart from the residuary gift, viz., to make provisions for the other living children and their issue.

Now one word only with regard to *Loring v. Thomas*. (1) I said I would indicate the differences between that will and the present. I will do so, although, as I have said, I protest against construing the present will by reference to the provisions of that will. In the will there in question you find there was no gift by the testator to his own children: he was dealing with the children of other persons as to whom it might well be supposed he was ignorant of the details of the family; you find

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C. A.        there was no such gift to the issue of a deceased son, or such  
1906        provisions for a son as to whose death it was doubtful, such as  
GORRINGE, you find here; further, the gift in *Loring v. Thomas* (1) was to  
*In re.*        children of certain persons without those emphatic words which  
GORRINGE        you find in the main gift here—"children who shall be living at  
*v.*        my death." I agree that if you make a gift to children, *prima*  
GORRINGE.        facie it means "children living at my death"; but if you are  
Romer L.J.        going to construe a will as to which it is doubtful whether the  
                 testator does not intend to include children who predecease him,  
                 then I may point out that you are enabled to avail yourself of  
                 the gift to children of another person with much greater ease  
                 than you could of a gift to "children who shall be living at my  
                 death." Further, there was that provision on which Kindersley  
                 V.-C. dwelt at some length in *Loring v. Thomas* (1), in regard to  
                 which he pointed out that when you came to the words "who  
                 shall," you not only have "who shall predecease me," but you  
                 have the words "and who shall attain the age of twenty-one  
                 years"; and in that will Kindersley V.-C. was able to point out  
                 that it was almost incredible to suppose that the testator could  
                 have used the word "shall" in "shall attain the age of twenty-  
                 one years" merely as a word of futurity, and that you found the  
                 two "shall"s combined in one sentence, and he refers to that  
                 most carefully. It must also be remembered that in *Loring v.*  
                 *Thomas* (1), as I have pointed out, Kindersley V.-C. indicates  
                 that the word "shall" creates a difficulty, and he goes most  
                 carefully through the precise conditions of that will in order to  
                 shew why on that will he got out of the difficulty. No such con-  
                 siderations, to my mind, apply to the present will, as I have  
                 endeavoured to indicate.

For this reason it appears to me that it is not right to attempt to construe the present will by reference to the will in *Loring v. Thomas* (1), and for these reasons I think the appeal ought to be dismissed.

FLETCHER MOULTON L.J. I am of opinion that in the case of this will there are no previous decisions which will relieve the Court of the task of deciding, by the language and provisions

of the will itself, the meaning of this particular disposition. I am aware that the language of the will in *Loring v. Thomas* (1) was in many respects similar to that which we have here, and I of course feel that the decision of the Vice-Chancellor in that case, and, if I may say so, still more the reasoning of the Vice-Chancellor in that case, are of great value to the Courts in guiding them in their decisions in analogous cases. Nevertheless I am satisfied that *Loring v. Thomas* (1) is not a case which, to use the phrase that was used in argument, governs the present case. A decision on language used in a will may be said to govern subsequent decisions when the Court has authoritatively laid down the meaning of special phraseology: such a decision rightly governs subsequent ones, because it justifies the profession in using the phraseology in that sense, and, by so justifying them, it induces them to use that phraseology when they intend to convey the meaning which it has thus been authoritatively decided to bear, and therefore it would be unjust for us, in the absence of special circumstances, to depart from the rules laid down by such a case. But the decision in *Loring v. Thomas* (1) falls far short of this. The Vice-Chancellor gave cogent reasons why the word "shall" in that particular collocation should be interpreted in that particular will in a sense which involved contingency but not futurity, but he expressly confined himself to stating that it might be so used, and he did not authoritatively determine that that was the meaning which it must bear in a Court of law in other cases.

I therefore feel that we must make an independent examination of the whole terms of the will, in order to come to a right conclusion as to the meaning of this particular bequest. Now to do that in a case like this, which is one of great difficulty, and as to which I have felt considerable doubt at various portions of the argument, I think the right course is to take first the terms of this particular disposition by themselves, separating them from all indications to be derived from the other portions of the will, in order that one may find what is the natural and *prima facie* meaning of the language of the bequest itself—not that this will be conclusive as to the meaning which we ought to give to it here, but

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because it is the meaning which we ought to prefer in the absence of adequate indications in the rest of the will that another less natural meaning should be put upon it. I feel the more willing to follow this course in the present case because it is evident to me that the bulk of the property passed under this residuary bequest, and that therefore (although no doubt substantial portions of the property passed under other portions of the will) this may, without straining and without danger of the Court misleading itself, be looked upon as being so much the substance of the will that it merits being considered by itself in the first instance.

The residuary estate is given in trust for the children that shall be living (I propose in my remarks not to refer to the contingency of their not attaining twenty-one or marrying, for the sake of shortness) at the death of the testator, with what is in form a proviso. When you come to look at that proviso you see that in its substance it is not really a proviso at all, but it heralds the enunciation of a new class of beneficiaries not included in the original class, and not taking from the original class. The original class is strictly limited to children living at the death of the testator; the class referred to in the proviso are grandchildren living at the death of the testator, who are the children of a son or daughter of the testator not living at his death, and therefore not included in what I have termed the original class. The consequence is, although in form it is a proviso, it really is an alternative qualification for sharing in the residue, and in my opinion it must not be treated as subordinate, but as co-ordinate, with the first class.

Now let us see what is the second qualification which entitles the beneficiaries to share—per stirpes, it is true, and not per capita—in the residue. The language of the will is “in case any one or more of my children shall predecease me leaving any child or children living at my death,” then those are to share. I have said that that is an alternative qualification, and if you compare it with the qualification of the original class, you see that it is similar to it in the fact that both contingency and futurity are involved in it. In the first class the question of their belonging to the class can only be decided, at earliest, at the date of the death of the testator; and it depends



upon whether they live till then. In the second class also it can only be decided at the death of the testator—the children must live till then—but there is the additional contingency that the parent shall have predeceased the testator. So that we have contingency and futurity in both cases.

Now let us look at the words which introduce the class which is to be found in the proviso. They are “in case any one or more of my children shall.” The words imply contingency—“in case”—and futurity in the word “shall”: but those words do not apply to the words “predecease me” only, they apply to the complex qualification “shall predecease me leaving any child or children living at my death”; and if you realize that they apply to the complex you see that the complex still implies contingency and still implies futurity, whether you take them to mean that the children of Alfred are included or that the children of Alfred are excluded. I want to go a little further. I think if you look at the way in which we ordinarily use the word “will” or “shall” in the English language when we are speaking of a complex, you will see that we should use it unhesitatingly if the complex as a whole involved futurity even though some elements of that complex belonged to the past. Let me give a sort of common illustration: Supposing a horse had won the Two Thousand and the Derby, nobody but a pedant would object to a man saying “I wonder whether it will win the three events” when the St. Leger still remained to be decided. The mind is carrying itself to a future and a contingent future—whether it will win the three events—and the fact that two of those three have already been won does not at all prevent the use of the word “will” being grammatical and right. If you look at the language here the predeceasing is to be combined with the leaving a child “living at my death.” Whether that complex is satisfied can only be decided in the future, namely, at the death of the testator. So that I am satisfied that the interpretation which makes this bequest apply to children both of a son who has died and of a son who is alive at the date of the will is not a non-natural interpretation which may be accepted under pressure, but is a natural interpretation which is at least as justifiable as the more limited one.

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This being so, let us suppose that this bequest stood alone, so that it was the disposal of the whole of the fortune of the testator. I do not believe that any Court would hesitate in saying: This method of distribution to children or, where children have died, to grandchildren in their parents' place, is so well known and is so equitable that we prefer to interpret the bequest in the sense that it does not exclude grandchildren by reason of the accidental fact that the death of their parent was earlier than the date of the will, instead of later. So that we may say that we start in the interpretation of this particular will with having established two points: first, that the wider interpretation is as defensible on strictly constructional grounds as the narrower one, and secondly that the inclination of the Court would be to hold that the testator had not made such an invidious distinction between his grandchildren as would be implied by treating differently the children of children who died before the date of his will and of those that died after that date.

So far we have been interpreting the bequest standing by itself: and the respondents here properly say that there are indications in the rest of the will that prevent it being just to regard this bequest as though it were isolated. That is certainly the case. We find, for instance, that the will begins with bequests in the shape of legacies to the children of this dead son. That fact unquestionably must weigh with the Court, but it must not have too much weight given to it; and when one considers that the amount of this residue would give about 15,000*l.* to each son or son's family, and that the totality of these legacies only amounts to 1300*l.* to the whole family of the dead son, one feels that one cannot assume that these specific legacies were intended to take the place of a share in the residue. The existence of these legacies must have its influence on the mind of the Court, but that influence is not overwhelming. And when one finds that almost all the others—in fact, I think all the others—do receive considerable legacies apart from the interest in the residuary estate—the two brothers receive the business (obviously a very substantial part) and the two sisters are allowed to remain for twelve months in the testator's residence, and, so far as I can see, all the children alive at the death of the testator

are entitled to share in the proceeds of the sale of the household furniture, pictures, plate, plated articles, books, engravings, jewellery, articles of vertu, and articles of household use and ornament, to the exclusion of the grandchildren of the deceased brother as well as the children of any child who might die after the testator's death—the inference to be drawn from the legacies to the children of the dead son becomes very much weaker. It is a case in which there have been legacies given, quite independent of share in the residuary estate, not only to the sons and daughters of the deceased son, but to all others who would naturally share in that residue.

I come to the conclusion, therefore, that there is nothing in the rest of the will that should make the Court come to a different conclusion as to the meaning of this bequest than if it stood alone. The indications from the other provisions are too uncertain, and, as in my opinion the presumption should be that there was no intention of excluding from such a substantial bequest the children of a child merely because he had died before the date of the will, and as I can find nothing in the language which points to the narrower construction rather than to the broader and more liberal construction, I am of opinion that we ought in this case to say that the children of Alfred are entitled to share in the residuary bequest.

I have not referred at all in my remarks to the son Richard, because it is clear that there was a deliberate and intentional exclusion of him from the position of beneficiary under this residual trust, and almost from the whole of the will. That exclusion being intentional and clear, the existence of Richard does not seem to me to bear in any way upon the interpretation of the rest of the will.

I am therefore of the same opinion as the President of the Court, and hold that this appeal ought to be allowed.

Solicitors: *Lumley & Lumley; Guscotte, Wadham & Co.; Schultz & Son.*

W. C. D.

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*In re* BARRY'S TRUSTS.

BARRY *v.* SMART.

[1905 B. 2673.]

*Revenue—Income Tax—Divorce—Separation Deed—Alimony—Deduction of Income Tax—Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 102, 103—Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 40.*

A divorce <sup>case</sup> was compromised by the parties agreeing upon a deed of separation whereby it was referred to an arbitrator to determine the amount of the wife's alimony, and, the arbitrator having fixed the amount, the husband, by a supplemental deed, covenanted to pay the annual sum awarded by the arbitrator to trustees in trust for the wife:—

*Held*, that the annuity was payable less income tax.

Decision of Kekewich J., [1906] 1 Ch. 768, affirmed.

APPEAL of the applicant, Mrs. Barry, from a decision of Kekewich J. (1)

The facts are fully stated in the previous report.

*Beddall*, for Mrs. Barry, repeated the arguments urged in the Court below.

*P. O. Lawrence, K.C.*, and *E. Ford*, for Mr. Barry, were not called upon.

*Norman*, for the trustees of the deed.

VAUGHAN WILLIAMS L.J. The practice of the Court as regards alimony does not touch this case in the slightest degree. The sole question is whether this is covered by the Income Tax Acts or not. In my opinion the decision of Kekewich J. is absolutely right on every point, and it would be wasting time to dispose seriatim of the arguments which have been addressed to us in support of the appeal.

ROMER L.J. I am of the same opinion. There is no serious legal ground for this appeal. The appellant herself, who, of course, is

(1) [1906] 1 Ch. 768.



not a lawyer, may have thought that there was, but I cannot understand how her legal advisers could have allowed her to embark upon this appeal.

FLETCHER MOULTON L.J. I agree.

Norman asked that the trustees, who were served with notice of the appeal, might be allowed their costs of appearing on the appeal.

VAUGHAN WILLIAMS L.J. No, we cannot allow them. You have done nothing here and your appearance was not wanted, and you cannot have any costs.

Solicitors: *Booth & Smee; Harcourt, Sons & Rolt.*

H. B. H.

*In re* BOSWELL.  
MERRITT *v.* BOSWELL. (1)  
[1904 B. 3290.]

*Limitations, Statute of—Part Payment—Solicitor's Bill—Recovery of Moneys due to Client—Retainer on account with Assent of Client.*

C. A.  
1906  
BARRY'S  
TRUSTS,  
*In re.*  
BARRY  
*v.*  
SMART.

KEKEWICH  
J.  
1906  
*Jan. 11, 19,*  
*23, 30.*

A solicitor brought in a claim for costs against a deceased client's estate which was being administered by the Court. Most of the costs were incurred more than six years before the judgment in the administration action. The solicitor, who had acted for the client in various matters for many years, during the whole of which period the client was heavily indebted to him, on several occasions recovered moneys for the client and made certain payments thereout on the client's behalf and, with the assent of the client, retained the balance on account of the client's indebtedness to him. On another occasion he received from an interested party a contribution to the costs of an action which formed the principal item of the claim and, with the assent of the client, placed the sum so received to the credit of the client's account:—

*Held*, that these transactions did not constitute part payments so as to take out of the operation of the Statute of Limitations the items which were barred at the date of the judgment.

Whether, when a payment on account is made by the debtor and

(1) Unavoidable delay in obtaining prevented us from publishing an  
some of the materials required has earlier report.—F. P.

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J.

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—  
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—

there has been no appropriation by either the debtor or the creditor, the law will appropriate it to the earliest of the items which at the date of the payment were not statute-barred, or will treat it as attributable *pari passu* to all such items so as to take them out of the operation of the statute, *quære*.

ON August 5, 1904, a creditor's action was commenced for the administration of the estate of J. F. Boswell, deceased, and by the judgment in this action, dated November 14, 1904, the usual inquiry was directed as to the testator's debts. The testator's estate was insolvent. Mr. M. S. Emerson, a Norwich solicitor, who had acted for the testator in an action of *Boswell v. Coaks*, in which the testator was one of the plaintiffs, and in other matters extending over a period of more than thirty years, brought in a claim for costs against the testator's estate for 5089*l.* 15*s.* 2*d.* This claim was embodied in three bills of costs delivered after the testator's death. The claimant had not delivered any bills of costs or rendered any accounts to the testator in his lifetime. The greater part of the claim was for the unpaid balance of the costs incurred in the action of *Boswell v. Coaks*, which lasted for a great many years and was concluded in 1888. The plaintiff set up the Statute of Limitations as an answer to the claim. It was admitted that there had been a payment on general account by the testator in 1893, and also a special payment by him in 1894 in respect of the costs in *Boswell v. Coaks*, but the plaintiff denied that there had been any later payments on account by the testator. The claimant relied upon several subsequent transactions as constituting part payments so as to take the case out of the operation of the statute. He stated in his affidavit in support of the claim that during the time that he acted as solicitor for the testator he had transacted numerous businesses for him, and had received and paid numerous sums of money for him and had charges for attendances against him, and that whatever sums of money he had credited, unless such sums were paid for a specific purpose, he had by the instructions of the testator placed to the credit of his general account, in which was included the case of *Boswell v. Coaks*. The claimant, was however, unable to produce any book containing any general account between himself and the testator, or any written records of any conversations with the

testator as to his indebtedness. The transactions relied on by the claimant were all entered in a cash account included in one of the bills of costs above mentioned.

The first transaction appeared under date January 1, 1896. On that occasion the claimant pressed the testator for a substantial payment on account of his indebtedness, and thereupon the testator paid him 20*l.* and expressed his regret that he was not in a position to pay him more. This sum was paid by the claimant into his private account, and was entered in the cash account as credited to the testator's general account.

The next transaction was dated December, 1897. Messrs. De Zoete and Gordon held two policies on the testator's life by way of deposit as security for a sum of 250*l.* advanced by them to the testator on his promissory note, and they desired to be paid off. It was accordingly arranged by the claimant, who acted throughout on the testator's instructions, that Mrs. Warner should advance 250*l.* to the testator and should take as security an assignment of these policies. The claimant then induced Messrs. De Zoete and Gordon to accept the surrender value of the policies, which was ascertained to be 181*l.*, in satisfaction of their debt, and the balance of 69*l.* was by the testator's instructions retained by the claimant on account of the testator's indebtedness to him. It appeared that the litigation in *Boswell v. Coaks* was really instituted for the benefit of all the creditors of Sir Robert Harvey, among whom Messrs. De Zoete and Gordon were included, and that the difference between the 181*l.* and the 250*l.* was intended by them as a contribution to the costs of that litigation.

The next transaction was referred to in two entries in the cash account dated respectively January 21 and February 27, 1902. In September, 1901, the claimant on the testator's instructions issued a writ against a man named Carter to recover a debt of 32*l.* 4*s.* 2*d.* due to the testator. On November 2 Carter paid 30*l.* to the claimant on account. This 30*l.* the claimant paid to the testator, who was pressed for money. The testator then instructed him to recover the balance as soon as possible and take it on account. On January 21, 1902, the claimant recovered from Carter a sum of 3*l.* 4*s.* for costs, and on February 27 recovered the sum of 2*l.* 4*s.* 2*d.*, the balance of the debt. These sums

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J. credit.

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The next transaction was entered in the cash account under date September 20, 1902. The testator was the assignee of a policy for 400*l.* on the life of a Mr. Greenwood, and on the security of this policy he had obtained an advance from a Mr. Watson. On Greenwood's death the claimant, by the testator's direction, applied to the insurance office for payment of the policy money, but before the money was paid the testator obtained from the claimant a loan of 100*l.*, which was to be repaid out of the policy money when received. In February, 1902, the claimant received from the insurance office a cheque for 400*l.* payable to the testator's orders. He gave the cheque to the testator, who indorsed it and handed it back to the claimant with instructions to pay Watson and keep the balance on account of his indebtedness. The testator shortly afterwards obtained from the claimant a further advance of 50*l.* On September 20, 1902, the claimant saw the testator, and explained to him that, after settling with Watson and deducting the advances of 100*l.* and 50*l.*, he had a balance in hand of 43*l.* 6*s.* 5*d.*, and the testator then told him to retain that on account, which he did.

The last transaction was entered under date 1904: "Lord Walsingham (*Boswell v. Coaks*) 20*l.*" Lord Walsingham was a creditor of Sir Robert Harvey, and as such was interested in the action of *Boswell v. Coaks*, and, after some correspondence between him and the claimant, by a letter written on November 8, 1903, he promised to contribute towards the costs of that action. The claimant then saw the testator, who said that he hoped that the claimant would be able to get substantial assistance from Lord Walsingham, and would put it to his, the testator's, credit. In 1904 the claimant received from Lord Walsingham's agent a cheque for 20*l.*, which he placed to the testator's credit accordingly.

The facts above stated depended entirely upon the evidence of the claimant, who was cross-examined in court upon his affidavit made in support of the claim.

*Christopher James*, for the claimant. The effect of the Statute of Limitations may be avoided by part payment of principal or



by payment of interest, because the law implies from such payment a promise to pay the residue or the principal, as the case may be, and, although by Lord Tenterden's Act an acknowledgment must be in writing in order to take the case out of the statute, that Act expressly provides that nothing therein contained shall alter or lessen the effect of any payment of principal or interest; and such payment may still be proved without the necessity of writing: *Cleave v. Jones*. (1) Nor is it necessary that money should actually pass between the debtor and the creditor; any transaction which will support a plea of payment is sufficient to bar the statute: *Maber v. Maber* (2); *Thomas v. Cross*. (3) In order that a part payment may operate to bar the statute it must be proved—(1.) that the payment was made on account of some debt; (2.) that it was made on account of the debt sued for; (3.) that it was made as part payment of a larger debt: *Tippets v. Heane*. (4) But in ascertaining the intention of the debtor in making the payment all the circumstances of the case are to be taken into consideration: *Friend v. Young*. (5) Applying the law to the facts of this case, there was for many years a general account between the claimant and the testator of which the costs in *Boswell v. Coaks* formed the principal item, and from time to time the testator made payments on the general account and also specific payments in respect of *Boswell v. Coaks*. The payments now relied on by the claimant are all made on general account. At the time of the first of these payments in 1896 the whole of the testator's indebtedness for the costs in *Boswell v. Coaks* was alive, it having been kept alive by previous part payments, and the effect of that payment was to keep the debt alive till 1902. That was followed by the transaction in December, 1897, which I rely on as a part payment within *Maber v. Maber* (2), and the effect of that was to keep the debt alive till December, 1903. That, again, was followed by similar transactions in 1902, with the result that the whole of the debt was alive at the date of the judgment in this action.

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(1) (1851) 6 Ex. 573.

(3) (1852) 7 Ex. 728.

(2) (1867) L. R. 2 Ex. 153.

(4) (1834) 1 C. M. & R. 252.

(5) [1897] 2 Ch. 421.

KEKEWICH J. *Armitage*, for one of the executors of the testator's will, did not oppose the claim.

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*P. O. Lawrence, K.C., and J. F. W. Galbraith*, for the plaintiff.

In this case no payment has been proved within six years of the judgment in the administration action or of the commencement of the action. The evidence does not shew that there ever was a general account, or that the claimant ever received instructions from the testator to put any moneys to that account. The fact that the claimant has recovered moneys belonging to his client and after paying him some part of the moneys has retained the balance in pursuance of the client's instructions to place it to his credit does not constitute a part payment from which the Court will infer a promise to pay: *Tippets v. Heane* (1); *Mills v. Fowkes* (2); *Waugh v. Cope* (3), which is very like this case. *Waugh v. Cope* (3) was approved by Lord Cranworth L.C. in *Nash v. Hodgson*. (4) As regards the payment of 20*l.* in January, 1896, in the absence of any appropriation by either party, the law will appropriate it to the earliest of the non-statute-barred debts, and the payment will not be treated as appropriated to an infinitesimal part of each item in the account: *Mills v. Fowkes*. (2) Therefore the only effect of that payment is to wipe the earlier debts out of the account. That is the great distinction between *Mills v. Fowkes* (2) and *Friend v. Young* (5), where there was one debt containing several items.

*Christopher James*, in reply. No case can be found where the doctrine of *Clayton's Case* (6) has been applied in the manner suggested. In *Nash v. Hodgson* (4) Turner L.J. assumed that the payment would be attributed to all the debts; and see *Walker v. Butler*. (7) So here the payment in 1896 kept alive everything that was not then statute-barred, and kept it alive for six years. That will not carry me up to the date of the judgment, and therefore my case depends on the payments made in 1902, but the earlier payments are material as shewing in respect of what I may claim. With regard to the Greenwood transaction,

(1) 1 C. M. & R. 252.

(2) (1839) 5 Bing. N.C. 455.

(3) (1840) 6 M. & W. 824.

(4) (1855) 6 D. M. & G. 474, 481.

(5) [1897] 2 Ch. 421.

(6) (1816) 1 Mer. 572.

(7) (1856) 6 E. & B. 506.

I submit that the evidence establishes an antecedent agreement that the balance should go in reduction of the testator's indebtedness, but at any rate there was a ratification of the transaction by the testator. The intention of the debtor in making the payment depends upon all the circumstances of the case ; it may be shewn by declarations either before or after the payment is made. Equally, it is submitted, it may be shewn by ratification : see *Friend v. Young*. (1) Here money was retained by the claimant with the assent of the testator, and the only thing for which it could be retained was the pending account.

*Cur. adv. vult.*

Jan. 30. KEKEWICH J. This is a creditor's administration action commenced by originating summons on August 5, 1904, in which the usual judgment was made on November 14, 1904. The testator in the action is James Freeman Boswell, who was one of the plaintiffs in the prolonged and costly litigation well known as *Boswell v. Coaks*. The claimant, Mr. Emerson, was the solicitor for the plaintiffs in that litigation, and he was also employed by Mr. Boswell in other matters. Mr. Emerson has brought in a claim the adjudication on which has been adjourned into Court before certificate. The claim is in respect of a large balance due on three bills of costs which were not delivered until after the testator's death. It is common ground that, except as regards some few items amounting to a small total, the whole claim is barred by the Statute of Limitations, unless there has been some part payment sufficient to take the case out of the statute. The argument turned on several alleged part payments, each of which must be examined separately, but before doing that it will be convenient to state briefly what is the general law on the subject. It is well settled, and may be gathered from numerous authorities ; but I take the following statement from Darby and Bosanquet's *Statutes of Limitations*, 2nd ed. p. 107 : "The principle of this doctrine" (namely, the doctrine that the effect of the statute may be avoided by part payment of principal or by part payment of interest) "is that any such payment is an acknowledgment of the existence of the debt, and from it the law

(1) [1897] 2 Ch. 421, 435.

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On January 1, 1896, when a large portion of Mr. Emerson's claim was already statute-barred, but a large portion was not, the testator made a payment to him of 20*l*. The evidence concerning this payment is to this effect: Mr. Emerson pressed for a substantial payment on account of his costs, but the testator declared his inability to find at the moment more than 20*l*., which sum was accordingly paid. I have no doubt that, having regard to all the circumstances, this must be taken to have been an acknowledgment by the testator that more than 20*l*. was due, and that from such acknowledgment there ought to be inferred a promise to pay. But what did the testator promise to pay? The whole balance or only so much of it as was not then statute-barred? As I read the authorities, the promise was only to pay so much as was not then statute-barred, the rule being that, in order to give the payment a more extensive operation, it must be shewn to have been made expressly on account of the statute-barred debt. I do not pursue this question further, because any claim under the inferred promise to pay is itself barred, as will be seen by reference to the dates above given of the commencement of the action and judgment. Something, however, must be said respecting another argument, which has also become immaterial, but which was forcibly urged on behalf of the testator's estate. The argument was that neither the debtor nor the creditor having made any appropriation of the payment it will be appropriated by law to the earlier items, that is, not statute-barred items in the account, and that there was no part payment in respect of any others. I do not say that this is unsound, but the question is one which ought not to be hastily decided. On this point the case of *Walker v. Butler* (1) is instructive. I refer to it here only for the purpose of quoting a few lines from the judgment of Erle J.: "I do not, however, by any means assent to the doctrine that, where there are two debts existing, and a payment is made, not specifically appropriated to either, there is necessarily no sufficient evidence of

(1) 6 E. & B. 506, 510.



a payment on account of either of those debts to take it out of the Statute of Limitations. It must depend upon the special circumstances of each case. In general, there would be evidence to go to the jury of a payment on account of both debts." It is worth while also to notice the concluding remarks of Stirling J. in *Friend v. Young* (1), a case which was largely quoted in argument and has since been studied by me with advantage, but to which I do not otherwise propose to refer.

The next item on which any question arises is dated in December, 1897. The short history of it is this. The testator owed money to certain persons to whom he had given security for the debt. Mr. Emerson on his behalf obtained the loan of a larger amount on the security, paid off the original creditors, and retained the balance of 69*l.* on account. He seeks to treat this as a payment by the testator of 69*l.*, from which a promise to pay ought to be inferred. It will be seen from what I am about to say on the evidence that there was none to support the conclusion that this money was expressly devoted to any statute-barred debt, and it follows that if any promise to pay could be inferred, that promise would extend only to so much of the debt as was not statute-barred. Ought even this promise to pay be inferred? I think not. First let me examine the evidence. It is impossible to treat Mr. Emerson as having stated either by affidavit or in the witness-box precisely what occurred between him and the testator respecting this transaction or the other two transactions of a similar character to be hereafter noticed. He scarcely pretends to state the language which the testator employed, and, having regard to all the circumstances of the case, it would be too much to expect him to do it. The general effect of the evidence is that the testator, knowing that some balance was due to him on the completion of the transaction, assented to that balance being retained by Mr. Emerson, who, he knew, had claims against him, and he may have used some such expression as "put the money to my credit or to my account." That is not enough. I will not dwell on the case of *Thomas v. Cross* (2), which was cited in this connection, contenting myself by saying that the observations of Martin B. on the

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(1) [1897] 2 Ch. 421.

(2) 7 Ex. 728.

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true explanation of the plea of payment are instructive; but the case of *Waugh v. Cope* (1) deserves more attention, and not the less so because it was approved by Lord Cranworth L.C. in *Nash v. Hodgson* (2)—a valuable authority, although I have not mentioned it—on other parts of this case. The circumstances of *Waugh v. Cope* (1) were very like those now under consideration. There letters took the place of conversations, but the result was a retainer by the creditor pursuant to directions of the debtor to give him credit in account, and the argument was precisely that addressed to me on behalf of Mr. Emerson. I quote the following words from the report of the argument on behalf of the plaintiff: “The transaction is the same as if there had been direct payment of the money by the defendant to the plaintiff, in part discharge of his bill. The defendant might have deducted these sums under a plea of payment.” This argument was rejected. The entire judgment of the Court is directly applicable to this case, but I will only read a part of it: “Now there have been several cases in which it has been considered, after much discussion, and adopted by all the Courts, that the payment must appear, either by the declarations or acts of the party making it, or by the appropriation of the party in whose favour it is made, to be made in *part*-payment of the debt in question: if it stands ambiguous whether it be part payment of an existing debt, or payment generally, without the admission of any greater debt as due to the party;—if it may have been made by the party paying in reduction of an account due to himself, or intended to satisfy the whole of the demand against him, then it is not sufficient to bar the Statute of Limitations.” The same result was expressed by Parke B. in *Thomas v. Cross* (3), already quoted, when he said that what was there urged to be a payment was not a payment, but a set-off only. The 69*l.* cannot in my opinion be properly treated as having been paid at all in the sense in which the word “paid” is used in this branch of the law.

The next transaction occurred in January, 1902, and was of a simple character. Mr. Emerson conducted some proceedings on

(1) 6 M. & W. 824, 827, 829.

(2) 6 D. M. & G. 474,

(3) 7 Ex. 728.

behalf of the testator against a man named Carter and recovered a small amount and costs. About what was paid for costs there is nothing to be said, but the amount recovered, 2*l.* 4*s.* 2*d.*, was retained by Mr. Emerson, and, as he says, placed by the direction of the testator to his credit. The evidence as regards this is similar to that respecting the sum of 69*l.*, and the observations on the latter sum apply to this also.

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The next transaction took place in September, 1902, and is rather more complicated. On the death of a Mr. Greenwood Mr. Emerson received from an insurance office 400*l.* due on a policy on his life, to which the testator was entitled, subject to a mortgage. Out of the 400*l.* Mr. Emerson discharged the mortgage and made payments to the testator, retaining the balance, amounting to 43*l.* 6*s.* 8*d.* This sum, like the 2*l.* 4*s.* 2*d.* and the 69*l.*, was money due from him to the testator and might have been sued for by him as money had and received, and if the testator had in fact sued for it, Mr. Emerson could have pleaded a set-off against the debt due from the testator to him. He was allowed to retain under circumstances precisely similar to those which occurred as regards the 69*l.* and the 2*l.* 4*s.* 2*d.* There is no occasion for me to repeat my conclusions respecting the evidence or the result of it.]

There remains one item of a different character. The litigation in *Boswell v. Coaks* was really for the benefit of all the creditors of Sir Robert Harvey, in which class Lord Walsingham was included. He recognized a moral obligation to contribute to the costs, and ultimately, after some correspondence, he sent a cheque for 20*l.* to Mr. Emerson. No doubt to this extent Mr. Boswell's liability to his solicitor was reduced; but as I read the evidence, including Mr. Emerson's cross-examination, Lord Walsingham did not make the payment on account of Mr. Boswell or in part payment of his debt, but in recognition of the moral obligation above mentioned. In no sense can the payment be treated as one by Mr. Boswell from which a promise to pay the balance of his debt can be inferred against him.

The result is that nothing has been done to take out of the operation of the Statute of Limitations the debts which were barred at the date of the judgment. It is admitted that this

KEKEWICH does not cover the entire debt claimed by Mr. Emerson, but that there are some few sums, amounting to about 25*l.*, in respect of which Mr. Emerson is entitled to prove. He will be admitted a creditor for those sums, and be allowed such costs in respect thereof as the Master thinks fit. He must pay the costs of the adjournment into court, but there will be no order as to costs of the claim in chambers except that the parties opposing will be allowed theirs in the ordinary course out of the estate.

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[The claimant appealed. On July 4, 1906, the appeal was by consent, ordered to stand over generally with a view to a settlement. It was said that the other creditors were willing to allow Mr. Emerson to prove for 1000*l.*, recognizing that it was a hard case, and counsel for the respondent was pressed to allow the appeal to be dismissed without costs. This was provisionally agreed to, and the case was treated as disposed of. On an application to have Mr. Emerson admitted as a creditor for 1000*l.*, Joyce J. declined to do this unless *all* the other creditors consented, and this consent had not been obtained at the time of going to press.]

Solicitors: *Whites & Co., for M. S. Emerson, Norwich; C. G. Scott.*

H. B. H.



## BRADFIELD v. CHELTENHAM GUARDIANS.

[1906 B. 1474.]

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June 15.

*Guardian of the Poor—Disqualification for Office—“Composition or Arrangement with Creditors”—Administration Order—Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 46, sub-s. 1 (c)—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 122.*

Where a guardian of the poor obtains an administration order under s. 122 of the Bankruptcy Act, 1883, providing for the payment of less than 20s. in the pound in respect of his debts, he has made a “composition or arrangement with his creditors” within the meaning of s. 46 of the Local Government Act, 1894, and is disqualified for office.

Observations on *Lowe v. Lowrie*, (1902) 18 Times L. R. 553.

In the month of March, 1904, George Bradfield was elected a guardian of the poor for the north ward of the borough of Cheltenham, to hold office for three years.

Judgment having been obtained against Bradfield in the Cheltenham County Court, he on or about December 1, 1905, preferred a request to that court for an order under s. 122 of the Bankruptcy Act, 1883, for the administration of his estate and for the payment of his debts, and in the request stated that his debts amounted to 44*l.*, and that he proposed to pay his debts to the extent of 10*s.* in the pound.

On December 1, 1905, the judge of the Cheltenham County Court made an order under s. 122 for payment of Bradfield's debts, as specified in the schedule to the request, to the extent of 10*s.* in the pound by instalments of 8*s.* a month.

Notice of the order was given by one of the creditors to the Cheltenham Board of Guardians, and the clerk to the guardians sent Bradfield a letter in January, 1906, stating, as was the fact, that the guardians proposed to take steps with a view to declaring his seat vacant, but before doing so were desirous of giving him an opportunity of explaining his position.

On February 15, 1906, at a meeting at which Bradfield was present, the following resolution was passed: “That, as Mr. George Bradfield of, &c., has become disqualified for holding

BUCKLEY the office of guardian for the north ward of the parish of  
J. Cheltenham by reason of having made a composition or arrange-  
1906 ment with his creditors (through his having been granted an  
BRADFIELD administration order under the Bankruptcy Act, 1883, s. 122,  
v. providing for the payment of his debts to the extent of 10s. in  
CHELTEN- the pound by instalments of 8s. per month) we the Board of  
HAM Guardians of the Cheltenham Union, in pursuance of the Local  
GUARDIANS. Government Act, 1894, s. 46, sub-s. 7, do now declare the office  
of guardian lately held by the said Mr. George Bradfield to be  
vacant."

At a meeting of the board held on February 22, 1906, at which Bradfield was present, a notice was, pursuant to the same s. 46, signed by three of the said guardians, and countersigned by their clerk, declaring the office of guardian held by Bradfield to be vacant on the ground stated in the resolution.

The said declaration was notified on the same day by a copy thereof being affixed on the notice board on the external door of the workhouse, and by a copy being sent to Bradfield.

At a meeting of the guardians held on March 1 Bradfield attended, but withdrew at the request of the chairman.

At another meeting, held on March 29, the clerk reported the receipt of a formal notice of a vacancy in the representation of the north ward, signed by two guardians, and in consequence an election was held to fill the vacancy, at which one Barnett was returned.

The plaintiff on the same day commenced an action against the guardians of the poor of the Cheltenham Union, in the county of Gloucester, claiming a declaration that he was not disqualified for holding or exercising the office of guardian of the poor or for being a member of the defendant board of guardians, and an injunction to restrain the defendants and their servants and agents from interfering with him in the exercise of his office of guardian of the poor for the north ward of the borough of Cheltenham and from proceeding with an election to fill his said office. He subsequently gave notice of motion for an injunction until after the trial of the action or until further order restraining interference with him in the exercise of his office.

*Corrie Grant* for the plaintiff. Sect. 46, sub-s. 1, of the Local Government Act, 1894, provides that “a person shall be disqualified for being elected or being a member . . . of a board of guardians if he . . . (c) has . . . since his election . . . been adjudged bankrupt, or made a composition or arrangement with his creditors.” The section must be strictly construed. In *Rex v. Chitty* (1) it was held that an uncertificated bankrupt was not disqualified from being elected a borough councillor and holding office unless he became bankrupt while holding office. The disqualifying section there was 5 & 6 Will. 4, c. 76, s. 52, and Denman C.J. said that “the Court would clearly not be justified in raising any inference of an intention to disqualify, where such an intention is not expressed.” The plaintiff has not been adjudged a bankrupt, but he has obtained from a county court, under s. 122 of the Bankruptcy Act, 1883, “an order for the administration of his estate.” The making of that order is something which is not adjudication in bankruptcy, and it is submitted that it is not a composition or arrangement with creditors within the meaning of s. 46, sub-s. 1 (c), of the Act of 1894.

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Sect. 4 of the Bankruptcy Act, 1883, states what a debtor must do in order to commit “an act of bankruptcy.” Obtaining an administration order is not one of the things there specified. Sect. 5 provides that where an act of bankruptcy has been committed a certain procedure has to be followed—viz., the presentation of a bankruptcy petition followed by a receiving order. Sect. 15 provides that the receiving order is to be followed by a meeting of creditors. Sect. 18, which provided for compositions and schemes of arrangement, has been repealed by s. 29 of the Bankruptcy Act, 1890, and s. 3 of the Act of 1890 and s. 19 of the Act of 1883 contain the provisions which are applicable to compositions and arrangements with creditors. The plaintiff comes under a different part of the Bankruptcy Act, 1883, viz., Part VII. Sect. 121 refers to small bankruptcies, but s. 122 provides for the relief of certain debtors in a totally different manner. By sub-s. 1 the application may be made by a judgment debtor, unable to pay the amount forthwith, whose whole

(1) (1836) 5 Ad. & E. 609, 611.

BUCKLEY J. indebtedness does not exceed 50*l.*, and the order made is not for bankruptcy, or composition or arrangement, but “for the administration of his estate, and for the payment of his debts by instalments or otherwise, and either in full” or partially, and subject or not to conditions. By sub-s. 5, after the order no creditor has any remedy against the debtor’s person or property in respect of any debt notified to the Court except with the leave of the Court and on such terms as may be imposed. Sub-s. 7 enables general rules to be made to carry out the order, and sub-s. 13 provides that “when the amount received under the order is sufficient to pay each creditor scheduled to the extent thereby provided, and the costs of the plaintiff and of the administration, the order shall be superseded, and the debtor shall be discharged from his debts.” The obtaining of an administration order is something quite distinct from composition or arrangement with creditors, and the plaintiff is not disqualified by what has occurred, and is entitled to be protected from exclusion from office.

Where an alderman made a composition with his creditors, but did not execute a composition deed, and no composition proceedings were taken under the Bankruptcy Act, 1869, it was held that he was not disqualified under s. 52 of the Municipal Corporations Act, 1835: *Aslatt v. Southampton Corporation*. (1) Under a composition the creditors must take something less than the full amount of their debts: *Reg. v. Cooban* (2); but s. 122 of the Bankruptcy Act, 1883, includes an administration which involves payment of the debts in full. [He also referred to *Lowe v. Lowrie*. (3)]

*Macmorran, K.C.*, and *C. Lacey Smith*, for the defendants. The plaintiff has made a “composition or arrangement with his creditors.” *Aslatt v. Southampton Corporation* (1) was decided on the construction of statutes which were different in their terms from those of the Local Government Act, 1894. The disqualification in s. 52 of the Municipal Corporations Act, 1835, is confined to cases in which an officer “shall be declared bankrupt, or shall apply to take the benefit of any Act for the relief of insolvent

(1) (1880) 16 Ch. D. 143. (2) (1886) 18 Q. B. D. 269.

(3) 18 Times L. R. 553.



debtors, or shall compound by deed with his creditors.” Sect. 46 of the Act of 1894 is wider in its terms.

Rules 2 and 3 of the Bankruptcy (Administration Order) Rules, 1902, shew that the debtor may apply for relief on payment of his debts in full or on payment of a composition.

It has been held in Ireland, under s. 46, sub-s. 1 (c), of the Local Government Act, 1894, that an arrangement with creditors under the Deeds of Arrangement Act, 1888, was a disqualification: *Corrigan v. Allison*. (1)

The observations of Phillimore J. in *Lowe v. Lowrie* (2) are merely dicta, as the question there was whether an order under s. 122 of the Bankruptcy Act, 1883, was being “adjudged bankrupt” within the meaning of s. 32 of the same Act.

BUCKLEY J. The plaintiff in this action on December 1, 1905, preferred at the Cheltenham County Court a request that an order should be made under s. 122 of the Bankruptcy Act, 1883, for the administration of his estate, and stated in his request that he proposed to pay his debts to the extent of 10s. in the pound. On that request the county court judge made an order on December 1, 1905, as asked. The question for decision is whether the plaintiff under those circumstances is a person who has made a composition or arrangement with his creditors within the language of s. 46, sub-s. 1 (c), of the Local Government Act, 1894. Now, no doubt, in the words of Lord Denman in *Rex v. Chitty* (3), “The Court would clearly not be justified in raising any inference of an intention to disqualify, where such an intention is not expressed.” I must look to see whether on the true construction of the Act of 1894 the Act has provided that there shall be a disqualification in such a case as this. The clause to be construed is a penal clause, and therefore to be construed strictly, and the question is, Has the debtor made a composition?

When I come to look at s. 122 of the Bankruptcy Act, 1883, I find that it is a section which enables the county court upon an application by the debtor to make an order providing

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(1) (1900) 64 J. P. 678. (2) 18 Times L. R. 553.  
(3) 5 Ad. & E. 609, 611.

BUCKLEY for the administration of his estate and for the payment of his  
 J. debts, "either in full or to such an extent as to the county court,  
 1906 under the circumstances of the case appears practicable," and  
 ~~~~~  
 BRADFIELD sub-s. 7 provides that "the order shall be carried into effect in
 v. such manner as may be prescribed by general rules." Sub-s. 13
 CHELTEN- provides that when the amount received under the order is
 HAM sufficient to pay each creditor scheduled to the extent thereby
 GUARDIANS. provided and the costs of the administration, the order shall be
 — superseded and the debtor shall be discharged from his debts to
 the scheduled creditors.

Rules have been made under sub-s. 7, the relevant rules being r. 2 and r. 3 of the Bankruptcy (Administration Order) Rules, 1902. By r. 2, "a debtor against whom a judgment has been obtained in a county court, and who desires to obtain an administration order under s. 122 of the Act, shall file" a certain "request and statement." By r. 3, "the debtor shall state in his request whether he proposes to pay his creditors in full, or whether he proposes to pay a composition." Then there are forms which are scheduled to the rules for the purpose of carrying them into effect.

The machinery, therefore, is this, that, the case being shewn to be one falling within s. 122, the debtor approaches the county court with the request that the court will make an order, the result of which will be that all his creditors will be bound to take, in this case, 10s. in the pound in satisfaction of their debts, and when that is done the debtor will be discharged from his debts to the scheduled creditors. Is a person who has availed himself of that machinery a person who has "made a composition or arrangement with his creditors"? It appears to me that he is. He could not make it without the concurrence of the Court, I agree, but he is a person who avails himself of a certain statutory means of making a composition with his creditors, and he makes the composition by applying to a Court of competent jurisdiction to make at his request an order which by force of the Act of Parliament will bind his creditors to take 10s. in the pound.

I am not aware, and counsel have not been able to shew me, that anywhere in the Bankruptcy Act is "composition or arrangement with creditors" defined, and, even if it were, the language

of the Local Government Act, 1894, is not, as was the language of the previous Act, addressed to compositions or arrangements under the Bankruptcy Act. There are no such words. The words of the Act of 1894 are simply that the debtor "has made a composition with his creditors," which I conceive are words wide enough to cover every composition howsoever made by the debtor with his creditors. It seems to me that when he approaches the county court under this section he applies to the jurisdiction which enables the order to be made, and thus makes a composition with his creditors. The decision of the Divisional Court in *Lowe v. Lowrie* (1) was not a decision on the point which I have to decide; it was a decision on the words "adjudged bankrupt," and there is nothing in the words of my brother Phillimore at the end of his judgment which binds me on the matter which I have to decide. That matter was not before the Court in that case, and did not arise for decision. I do not find anything there which relieves me from the necessity of deciding the point for myself. I think that here there was a composition with the creditors, and that the plaintiff's motion fails, and must be dismissed with costs.

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Solicitor for plaintiff: *C. T. Courtney Lewis, for G. Trevor Wellington, Gloucester.*

Solicitors for defendants: *Crowders, Vizard, Oldham & Co., for Ticehursts, McIlquham & Wyatt, Cheltenham.*

(1) 18 Times L. R. 553.

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June 20, 27.

[1906 N. 577.]

Company—Accounts—Balance-sheet—Reserve Fund—Secrecy—Information withheld from Shareholders—Auditors not to disclose Information—Ultra vires—Companies Act, 1900 (63 & 64 Vict. c. 48), ss. 21, 22, 23.

A company under the Companies Acts has no power to make regulations precluding its auditors from availing themselves of all the information to which under the Companies Act, 1900, they are entitled as material for the report to be made by them to the shareholders as to the true state of the company's affairs.

Resolutions were passed by a company to alter their articles by inserting a provision that the directors might set aside out of profits (without disclosing the fact) sums to form an internal reserve fund; that this fund need not be shewn in or disclosed by the balance-sheet, and that no information need be given to the shareholders as to its amount, investment or application; that the directors might invest it as they thought fit without being liable for loss in consequence of such investment; that they might apply it for any purposes which they considered would advance the interests of the company; and that, while the particulars as to this fund were to be disclosed to the auditors, it was to be the auditors' duty not to disclose any information with regard to it to the shareholders or otherwise:—

Held, that these resolutions were ultra vires as being inconsistent with the obligations imposed upon auditors by s. 23 of the Companies Act, 1900.

ACTION by a shareholder for an injunction to restrain the company and its directors from acting upon special resolutions which had been passed to alter the articles of association of the company by inserting provisions for the creation of an internal reserve fund.

The company was formed to carry on the business of manufacturers of and dealers in ordnance, small arms, ammunition and machinery. Its capital consisted of 600,000*l.*, divided into 79,370 ordinary shares of 5*l.* each and 40,630 preference shares of 5*l.* each. By clause 3 of the memorandum of association the objects of the company included wide powers of investment, &c., and by clause 3 (*u*), “generally to do all such things as are

incidental or conducive to the attainment of the above objects or any of them.”

The material clauses of the articles of association were as follows :—

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“124. Subject to the provisions hereinbefore contained and to the rights of members entitled to preference shares or shares issued upon special conditions, the profits of the company shall be divisible among the members in proportion to the amount paid up or credited as paid up on the shares held by them respectively ;

“125. The company in general meeting may declare a dividend to be paid to the members according to their rights and interests in the profits, and may fix the time for payment, but no larger dividend shall be declared than is recommended by the directors. The company in general meeting may, however, declare a smaller dividend.”

“132. The directors may, but shall not be obliged, before recommending or declaring any dividend or bonus out of, or in respect of, the earnings or profits of the company for any yearly or other period, cause to be reserved, or retained and set aside, out of such profits, such sum as they may think proper to form a reserve fund or reserve funds to meet contingencies or depreciation in the value of the property of the company, or for equalizing dividends, or for repairing, improving and maintaining any of the property of the company, providing against losses, meeting claims on, or liabilities of, the company, or for such other purposes as the directors shall in their absolute discretion think conducive to the interests of the company.

“133. All monies carried to the reserve fund and all other monies of the company not immediately applicable or required for any payment to be made by the company, may be either employed in the business of the company, or be invested by the directors upon such securities (other than the purchase of or loan upon shares of the company), as the directors may from time to time think proper, with power for them to make such investments in the name of the company, or of trustees for the company, as they may think fit, and from time to time to deal with and vary such investments, and to dispose of all or any

BUCKLEY part thereof for the benefit of the company, and to divide the
 J. reserve fund into such special funds as they may think fit.
 1906
 NEWTON the monies received and expended by the company, and all
 v. matters in respect of which such receipt and expenditure take
 BIRMINGHAM place, and of the property, assets, credits and liabilities of the
 SMALL ARMS company."
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"136. The directors shall from time to time determine whether and to what extent, and at what time and places, and under what conditions or regulations the accounts and books of the company, or any of them, shall be open to the inspection of the members, and no member shall have any right of inspecting any account or book or document of the company, except as conferred by statute or authorized by the directors, or by a resolution of the company in general meeting.

"137. At the ordinary meeting in every year the directors shall lay before the company a balance-sheet containing a summary of the property and liabilities of the company, made up to a date to be therein mentioned, which shall be as near the day of meeting as can conveniently be fixed.

"138. Every such balance-sheet shall be accompanied by a report of the directors as to the state and condition of the company, and as to the amount which they recommend to be paid out of the profits by way of dividends or bonus to the members, and the amount (if any) which they propose to carry to the reserve fund, according to the provisions in that behalf hereinbefore contained. Such balance-sheet and report shall be sent out to the members at least seven days before the meeting at which they are to be presented.

"139. The accounts of the company shall, once at least in every year, be examined and audited by an auditor or auditors. . . ."

"142. Before any balance-sheet is laid before a general meeting, it shall be laid before the auditor or auditors a sufficient time before the day appointed for the meeting, to allow him or them to examine the same; and the auditor or auditors shall report thereon to the general meeting, generally or specially, as he or they shall think fit."

"144. Every account of the directors, when audited, and

approved by a general meeting, shall be conclusive, except as regards any error discovered therein within three months next after approval thereof; and whenever any such error is discovered within that period the account shall forthwith be corrected and thenceforth shall be conclusive."

The regulations contained in Table A in the First Schedule to the Companies Act, 1862, did not apply to the company.

At extraordinary general meetings of the company held in January and February, 1906, the following special resolutions were passed and confirmed:—

"That the articles of association of the company be and they are hereby altered as follows: (1.) By the insertion after article 133 of the following article: '133A. In addition and without prejudice to the powers conferred by articles 132 and 133 the directors may in any year in which they shall recommend a dividend to be paid on the ordinary shares of the company of not less than 10 per cent. on the amount paid up thereon set aside (without disclosing the fact) out of the earnings or profits in such year remaining after providing the amounts necessary to pay the dividends payable on preference shares and the dividend which they recommend on the ordinary shares such a sum as they may deem necessary or desirable in the interest of the company as an internal reserve fund, or as an addition to such internal reserve fund when formed, which internal reserve fund shall be held upon the terms and for the purposes following, that is to say—(a) The internal reserve fund shall be separate from the reserve fund under article 132, and need not be shewn in or disclosed by the balance-sheet, and the directors need not give any information to the shareholders as to the amount, investment, or application thereof, or otherwise in relation thereto, either in their report or otherwise. (b) Such internal reserve fund may be invested upon such investments (other than the shares of the company) as the directors may in their absolute discretion think fit, without their being liable for any depreciation of or loss in consequence of such investments, whether the same be usual or authorized investments for trust funds or not. (c) Such internal reserve fund may be used and applied at the discretion of the directors for any purpose for which the ordinary

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reserve fund is available, or for any purposes which the directors in their absolute discretion may consider will serve, protect, or advance the interests of the company, or preserve or promote the value of the undertaking, assets, or goodwill of the company.

(d) The directors shall disclose the internal reserve fund and the amount thereof, and all additions thereto, and all other particulars in respect of the said fund to the auditors of the company appointed by the shareholders, whose duty shall be to see that the same is applied for the purposes of the company in accordance with the provisions hereinbefore contained, but not to disclose any information with regard to the same to the shareholders or otherwise.'

"(2.) By inserting at the commencement of articles 136, 137 and 138 respectively, the words, 'Subject to the provisions of article 133A as to an internal reserve fund, and to any exercise of the powers of such article.'

"(3.) By inserting at the end of article 142 the words, 'Subject to the provisions of article 133A as to an internal reserve fund and the discretion of the directors in relation thereto.'"

Buckmaster, K.C., and *H. K. Newton*, for the plaintiff. The resolutions are *ultra vires*, because they will enable the directors to conceal from the shareholders the true position of the company, and to withhold from them all information with regard to the way in which this secret reserve fund has been dealt with, or even the amount and extent to which it has grown. They will absolutely shut out the shareholders from any right whatever to know either of the existence of such a fund or its investment or extent; and further, if these articles are acted on, they will compel the auditors to disobey the statutory obligations thrown on them by the Companies Act, 1900. Sect. 23 of that Act provides that the auditors of a company shall be entitled to get all necessary information, "and shall make a report to the shareholders on the accounts examined by them, and on every balance-sheet laid before the company in general meeting during their tenure of office; and in every such report shall state whether, in their opinion, the balance-sheet referred to in the report is properly drawn up so as to exhibit a true and correct

view of the state of the company's affairs as shewn by the books of the company; and such report shall be read before the company in general meeting." Sects. 21, 22 and 23 of that Act are practically the same as s. 7 of the Companies Act, 1879, except that that was limited to banks. The articles provide for accounts, a balance-sheet, and an audit. These resolutions say that the auditors shall not make a true report or disclose the true position of the company to the shareholders. It is impossible to draw up a correct balance-sheet unless the condition of the secret reserve fund is disclosed; but the object of these resolutions is to take the fund out of the balance-sheet altogether. We do not suggest that they will do so, but the directors will be able to use this fund for bribing, or invest it in the funds of an unlimited company, and the auditors will know that and be bound not to disclose it. A company cannot contract itself out of s. 23 in this way any more than out of the right to present a petition: *In re Peveril Gold Mines, Ltd.* (1); or the rights of dissentient shareholders under s. 161 of the Companies Act, 1862: *Payne v. Cork Co., Ltd.* (2) A majority of shareholders cannot bind the minority to act in this way. Under these resolutions the auditors will be compelled to commit a misdemeanour, and the resolutions will be no answer to such a charge. Even if they could shew that every member of the company had agreed to the resolution that would not protect them. It has been laid down on s. 7 of the Companies Act, 1879, that auditors must give the shareholders all necessary information as to the true financial position of the company: *In re London and General Bank* (No. 2). (3)

Before the Companies Act, 1900, there was no statutory obligation on a company to keep accounts or shew a balance-sheet; but a shareholder could compel directors to account. His right was that of an owner of property to call upon the managers of his property to keep such accounts as would enable him to ascertain how the management had been conducted, and what his position was with regard to the industry with which he was connected: *In re Forest of Dean Coal Mining Co.* (4) Under

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(1) [1898] 1 Ch. 122.

(2) [1900] 1 Ch. 308.

(3) [1895] 2 Ch. 673.

(4) (1878) 10 Ch. D. 450.

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these resolutions a shareholder will lose this right. It is true that the Act of 1900 does not say that a balance-sheet shall be laid before the shareholders or how often one shall be prepared. But even before that Act directors could not have refused to lay a balance-sheet before the shareholders; and that is the reason why it is not mentioned.

Sir R. B. Finlay, K.C., and R. J. Parker, for the company. The resolutions are not ultra vires. We admit that the auditors' duty under s. 23 is a duty which they must discharge, and the company cannot prevent them from doing so. The real question is whether the resolutions are inconsistent with that duty. Prior to the Companies Act, 1900, there was at any rate no statutory obligation on a company to keep accounts or shew a balance-sheet. It had been held that shareholders might be precluded by the articles from having access to the books. No doubt a balance-sheet is usual, and it must be a complete balance-sheet, but there is nothing in the nature of a common law right to a balance-sheet. The auditors cannot get at the true financial position of the company without drawing up a balance-sheet; but non constat that that is the balance-sheet which the shareholders are to see. They are only to see such accounts as they are entitled to under the articles.

Many companies and commercial houses find the necessity of keeping a secret reserve fund of this kind. If its position is disclosed, and the public get information about it, great injury may be done to the business. Difficulties may be caused between rival traders or between capital and labour. The common way to create a secret reserve fund is by undervaluing the assets of the company, and we are only trying to do the same thing with the knowledge and consent of the shareholders. There is nothing illegal in our proposals. A company is not bound to shew a complete balance-sheet of all its assets and liabilities. The only part of the profit and loss account which need appear in the balance-sheet is the balance. If the credit balance is stated after paying something to the secret reserve fund it is a statement of the true balance. The auditors could thus give a complete balance-sheet without mentioning the payment. It would be an accurate report on their part to say "this balance-sheet discloses

the true position of the company except that, in accordance with the articles, the internal reserve fund is omitted; but we have gone into the matter, and we find that the fund has been dealt with in compliance with the resolutions"; and it would be a sufficient report within the section. Such a report would not cover malversations, for the auditors have to send a certificate that all their requirements have been complied with; and have to state in their report that the balance-sheet exhibits a true and correct view of the state of the company's affairs. They would be bound to report anything that was wrong or was not conducive to the objects of the company within clause 3 (u) of the memorandum. The articles could not prevent that. The resolutions mean that the auditors are not to state the details in their report and balance-sheet. They do not mean that they are to conceal malversations. Auditors never report upon the way in which the ordinary reserve fund of a company is dealt with.

There is nothing to prevent shareholders from contracting not to see particular accounts. It is often done in the case of partnerships. The majority can bind the minority: every shareholder joins the company on that footing.

Buckmaster, K.C., in reply.

Cur. adv. vult.

June 27. BUCKLEY J. In February last this company passed special resolutions whose short substance is that the directors may, under defined circumstances, set aside (without disclosing the fact) out of profits sums to form an "internal reserve fund"—a sort of secret service fund—and that this fund need not be shewn in or disclosed by the balance-sheet and no information need be given to the shareholders as to its amount, investment, or application; that the directors may invest it as they think fit without being liable for loss in consequence of such investments; that they may apply it for any purposes which they consider will advance the interests of the company; and that, while the particulars as to this fund are to be disclosed to the auditors, it is to be the auditors' duty not to disclose any information with regard to it to the shareholders or otherwise. The question for decision is whether, having regard to ss. 21 to 23 of the Companies Act, 1900, these special resolutions are ultra vires.

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The Companies Act, 1862, was silent as to accounts. Table A (which the company might or might not adopt, as it chose) contained provisions on the subject, but otherwise the Act left the matter untouched, relying, no doubt, upon the application of the ordinary principles applicable as between partners and proceeding upon the footing that the members of a company under the Act are partners in a special sort of partnership modified and governed by statutory provisions. The Companies Act, 1879, s. 7, contained, for the first time, provisions as to audit of accounts, and was confined to banking companies registered after 1879 as limited companies. The Companies Act, 1900, ss. 21 to 23, for the first time contained provisions as to the audit of the accounts of other companies under these Acts. The provisions of the Act of 1879 and those of the Act of 1900 are closely similar, though not the same; so similar, indeed, as that the reason for the difference is hard to seek. The principal differences that I trace are that the Act of 1879 does, while the Act of 1900 does not, provide affirmatively for an annual audit, and that the Act of 1879 does, while the Act of 1900 does not, provide that if there is no auditor a meeting shall be forthwith called to elect an auditor. As regards the former of these, I think the Act of 1900 (though it does not do so expressly) does impliedly provide for an annual audit. Sect. 21, sub-s. 1, requires the annual appointment of an auditor to hold office for one year, and the Act contemplates that he will audit during his tenure of office. There will thus result an annual audit. As regards the latter, I find that s. 21, sub-s. 2, provides for the appointment of an auditor by the Board of Trade on the application of any member in case an auditor has not been appointed at the annual meeting. Neither statute contains any provision in favour of the public in the matter of publication of the accounts. The two statutes do not I think really differ in substance in their result. The question is how far the Act of 1900 goes in requiring for the protection of the members that the accounts shall be open to audit and that a report shall be made to the members upon them. The defendants do not dispute that, if and so far as the special resolutions are inconsistent with the Act, the Act must prevail. The concluding sentence of s. 23 requires that the

auditor shall state whether the balance-sheet exhibits a true and correct view of the state of the company's affairs as shewn by the books. Sir Robert Finlay argued that these words are satisfied if the auditors report that the balance-sheet does not exhibit a true view, and that the statute does not, in these words, say that they shall report what is the true view. This is logically true as regards the language, but, in my judgment, the statute is saved from the reproach of having achieved no more than this impotent result by words earlier in that section, which provide that the auditors are to report to the shareholders on the accounts. A report upon the accounts involves a report of the result of the accounts, and this necessarily involves, as matter of substance if not of form, the statement of a balance-sheet or the equivalent of a balance-sheet. There are, I agree, in the Act of 1900 no affirmative words to the effect of what I am about to state, but I think the language of the Act is sufficient to shew that by implication it requires that there shall be annually an audit of the accounts resulting in a balance-sheet, to whose accuracy the auditors shall speak.

The special resolutions in the present case provide that the balance-sheet shall not disclose the internal reserve fund. It must therefore omit on the assets side of the balance-sheet the assets which make up the amount standing to the credit of that fund and the contra item—namely, the credit balance of the fund—on the liability side. The result will be to shew the financial position of the company to be not so good as in fact it is. If the balance-sheet be so worded as to shew that there is an undisclosed asset, whose existence makes the financial position better than that shewn, such a balance-sheet will not, in my judgment, be necessarily inconsistent with the Act of Parliament. Assets are often, by reason of prudence, estimated, and stated to be estimated, at less than their probable real value. The purpose of the balance-sheet is primarily to shew that the financial position of the company is at least as good as there stated, not to shew that it is not or may not be better. The provision as to not disclosing the internal reserve fund in the balance-sheet is not, I think, necessarily fatal to these special resolutions. The Act, however, provides that the auditors shall

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report to the shareholders on the accounts examined by them. These auditors will examine, amongst others, the accounts of the internal reserve fund. A principal question in this case, I think, is whether it is a compliance with these words of the Act that the auditors shall report that they have examined the accounts as to the internal reserve fund, that they are satisfied with them, and that the funds have been employed in manner authorized by the company's regulations, or whether there will be default in complying with the Act if they do not go on to say how the fund has been employed. In my judgment such a report would be a sufficient report within the Act if the auditor is bona fide satisfied that in making this report, and nothing further, he is truly reporting as to "the true and correct view of the state of the company's affairs." But the special resolutions do not stop there. They provide that it shall be the duty of the auditor not to disclose any information with regard to this fund to the shareholders or otherwise. It is, I think, inconsistent with the Act of Parliament that the auditor shall be bound, even when he thinks that the true state of the company's affairs is affected by facts relating to the internal reserve fund, to withhold all information with regard to the same from the shareholders. If, for instance, the directors had invested the internal reserve fund upon investments which might involve the company under certain circumstances in enormous loss, the Act, I think, requires that the auditor shall be at liberty and be bound to report that fact. In reporting upon the accounts submitted to them the auditors do not, of course, report as to the details of accounts to which they find no cause to take exception. Their duty is to call attention to that which is wrong, not to condescend upon all the details of that which is right. It is, I think, competent to the statutory majority of the shareholders to say that as to particular items of their business it is to the interest of the corporation that there shall be secrecy, and that the auditors, who must for the purposes of their audit know all such details, shall not, unless their duty under the statute requires it, disclose such details to the members. There is no suggestion in this case that these clauses are intended to be used for any other than a legitimate purpose. Those who are engaged in commerce are

familiar with the fact that undue publicity as regards the details of their trade, or as to their financial arrangements, may often be very injurious to traders, having regard to the rivalry of competitors in trade, to complications sometimes arising from strained relations between capital and labour, and the like. There are legitimate reasons for ensuring secrecy to a proper extent. It is not, I think, necessary, nor, having regard to the great utility of these Acts, is it desirable, to expose persons who trade under these Acts to the necessities of a publicity from which their competitors are free unless such publicity is required to ensure commercial integrity. I am not disposed to look too closely for reasons why I should find clauses such as these to be inconsistent with the Act if I see that the true purpose of the Act is satisfied. I think, however, these special resolutions go too far. Any regulations which preclude the auditors from availing themselves of all the information to which under the Act they are entitled as material for the report which under the Act they are to make as to the true and correct state of the company's affairs, are, I think, inconsistent with the Act. The defendants have left me in some doubt as to the exact position which they take up in the matter. They have desired to obtain the opinion of the Court upon the general question under the Act. They are entitled to do so, and this judgment, I hope, will put them in possession of my views on the subject, but I am not clear whether they threaten and intend to act upon the resolutions as they stand. They say, truly, that as regards the details of the resolutions, when they know the view of the Court upon the Act of Parliament they can by further special resolutions alter their scheme so as to make it consistent with that view. There are no pleadings, so that it is only from the attitude of the defendants at the bar that I can ascertain whether they threaten and intend to do the act against which an injunction is sought. It is not according to the practice of the Court to enjoin an act unless the defendants threaten and intend to do it. I postpone, therefore, for the moment the question of the exact form of the order so that I may hear what the defendants have to say.

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BUCKLEY [After some discussion an injunction was granted restraining
J. the company from acting on the special resolutions.]
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BUCKLEY *In re* "OTTO" ELECTRICAL MANUFACTURING
J. COMPANY (1905), LIMITED.
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JENKINS' CLAIM.
July 3.

[0073 of 1906.]

Company—"Entitled to commence Business"—Non-commencement before
Winding-up—Effect on Contracts—Companies Act, 1900 (63 & 64 Vict.
c. 48), s. 6.

In s. 6 of the Companies Act, 1900—which provides that "any contract made by a company" (registered after 1900 and inviting the public to subscribe for its shares) "before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding"—the word "provisional" means that the contract is to be read as if it contained a provision that it should not be binding on the company unless and until the company became entitled to commence business.

The section applies to all contracts of a company, whether preliminary or final, or in the course of carrying on its business.

Where, therefore, a company had gone into liquidation without having become entitled to commence business, a claim by a person resting on certain alleged contracts with the company, one part of the claim being for moneys paid for furnishing temporary offices for the company, was disallowed.

THE "Otto" Electrical Manufacturing Company (1905), Limited, was registered, with a capital divided into shares, on May 29, 1905. Some shares were subscribed for in its memorandum of association, and it issued a prospectus inviting the public to subscribe for its shares, but none of its capital was paid up, and none of its shares were allotted. The company never had a registered office; it was never entitled to commence business, and before the end of 1905, it went into voluntary winding-up.

In the liquidation A. C. M. Jenkins claimed that the company

was indebted to him for, amongst other things, sums paid for furnishing offices which the claimant took for the company at the request of the directors.

The liquidator took out a summons in the winding-up for the determination of the question whether the claims of Jenkins and other persons in a similar position ought to be allowed, having regard to s. 6 of the Companies Act, 1900.

Ward Coldridge, in support of the claim. The Legislature could not have intended that the company should be disabled from entering into any contract before it became entitled to commence business. The words of s. 6, sub-s. 3, of the Companies Act, 1900, must be construed as extending only to contracts in or relating to the carrying on of the company's business, and not as including contracts with relation to preliminary expenses which must necessarily be incurred before business is commenced. The distinction between debts incurred in respect of preliminary business and other debts is pointed out by Kelly C.B. in *Ex parte Ward*. (1) The public are sufficiently protected by s. 4 of the Act of 1900, which places restrictions on the allotment of shares. Sect. 6 itself shews that all contracts are not referred to, because it requires a certain allotment of shares, and payment in pursuance of contracts before the company is entitled to commence business.

In connection with s. 6 of the Act of 1900, certain provisions of the Companies Act, 1862, must be borne in mind. For instance, s. 17 of that Act requires a company to pay certain registration fees.

[BUCKLEY J. That is not a contract.]

Sect. 23 of the Act of 1862 provides for the constitution of an agreement for membership by a person signing the company's memorandum of association: *Evans's Case*. (2) Then s. 18 of the Act of 1862 provides that on registration the company shall be "a body corporate . . . capable forthwith of exercising all the functions of an incorporated company," and one of those functions is to enter into contracts.

[BUCKLEY J. That section must be read subject to s. 6 of the

(1) (1868) L. R. 3 Ex. 180.

(2) (1867) L. R. 2 Ch. 427.

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BUCKLEY J. Act of 1900 in the case of companies to which the later provision applies.]

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Without attempting to define the expression "preliminary expenses," examples can easily be given, and one of them is where expenses are incurred in hiring temporary offices for the use of the company. [He also referred to s. 26 of the Companies Act, 1900.]

Peterson, for the liquidator. Sect. 6 of the Act of 1900 says in plain terms that "any contract" made before the company is entitled to commence business "shall not be binding on the company until that date." There is nothing to support the contention that preliminary contracts are outside the section. If a claim is based on contract, and that contract has always been provisional or conditional on something happening which has never happened, there is no binding contract. If the section does not apply to contracts which are merely incidental to carrying on business, the usual vendor's agreement with the company would be outside the section, and that would defeat the purpose of the section.

Coldridge in reply.

BUCKLEY J. The question to be determined is whether Mr. Jenkins, who claims to be a creditor of the company, can, having regard to s. 6, sub-s. 3, of the Companies Act, 1900, be heard to say that he is a creditor. Sect. 6 is one which provides that "a company shall not commence any business"—it is not shall not commence "its business," but "any business"—unless certain conditions are complied with. [His Lordship read sub-s. 3, and continued :—] The word "provisional" there means, I think, this, that the contract is to be read as if it contained a provision that it shall not be binding on the company unless and until the company becomes entitled to commence business.

Now this company never did become entitled to commence business; therefore any contract made by the company was provisional and not binding on the company. But Mr. Coldridge has argued that the Act of Parliament does not mean what it says, that it does not mean any contract, but any contract of a certain kind; and his next difficulty is to define of what kind.

He says that it means any contract entered into for the purpose of carrying on its business, and that there are some contracts which are not entered into for the purpose of carrying on the business, but which are what he calls "preliminary"—as for expenses incurred with a view to the future carrying on of business.

I think that argument is altogether unsound. A company of this kind has no purpose of existence other than the carrying on of its business, and every contract which it enters into must be a contract entered into for the purposes of its business in some form or other; whether it is preliminary or final, or one in the course of carrying on its business, makes no difference. All its contracts must be with relation to its business; and I repeat that the language of the section is that "the company shall not commence any business" until certain conditions have been complied with. We are all familiar with the fact that under a previous system of legislation there was what was known as "provisional registration" and "complete registration" (7 & 8 Vict. c. 110). I think this sub-section is intended as a return to some extent to the provisions which were contemplated by that system of legislation. The intention here is that, if the company never becomes entitled to commence business, nobody shall be able to say that he can sue the company in contract; the contract must be one which impliedly contains a provision that, unless and until the company is entitled to commence business, the company is not bound.

Those being the general questions, the exact facts here are these. The claimant, Mr. Jenkins, went to a furniture dealer, bought furniture, and had it put into an office which he took for the company. He says that he has paid the furniture dealer in respect of that the sum of 240*l.*, and he says: "I claim payment of that by the company." How does he claim? Obviously in contract; he claims upon this ground—that, expressly or by implication, the company promised to pay him for the furniture if he would pay the furniture dealer for it. Of course, that is contract. The Act of Parliament says that that contract is not binding on the company, and he cannot sue here. The other claims are for moneys which he

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BUCKLEY advanced to a man to come up to town when he was going to
 J. serve the company, and other payments of a like kind. They
 1906 are all claims in contract. In my judgment he cannot be heard
 "OTTO" to say that there was such a contract; the Act of Parliament
 ELECTRICAL forbids it. I declare that as the company was never entitled to
 MANU- commence business no contract entered into by it is binding on
 FACTURING the company, and that Mr. Jenkins's claim, which is the only
 COMPANY one before me, must be disallowed.
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Solicitor for applicant: *G. T. B. S. Thurnell.*

Solicitors for liquidator: *Lowndes & Son.*

F. E.

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In re LEES BROOK SPINNING COMPANY.

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[1906 L. 537.]

May 26 ;
 June 1.

*Company—Practice—Reduction of Capital—Paying off Capital in excess of
 Company's Wants—Procedure—Companies Act, 1867 (30 & 31 Vict.
 c. 131), ss. 9, 15—Companies Act, 1877 (40 & 41 Vict. c. 26), ss. 3, 4.*

The provisions of the Companies Acts as to reduction of capital by paying off capital in excess of the wants of the company contemplate that the order of the Court and the registration of the minute stating the reduced capital are to precede any repayment of capital; and they do not contemplate two orders being made on a petition for such reduction, one a preliminary order sanctioning the reduction, and the other an order approving the minute after the reduction has been carried into effect. The minute is intended to shew what the capital will be after the reduction has been carried into effect. There should only be one order sanctioning the reduction and approving the minute.

Form of minute.

In re Calgary and Edmonton Land Co., [1906] 1 Ch. 141, not followed.

THIS was a petition for confirmation of a reduction of the capital of the Lees Brook Spinning Company by returning to the shareholders paid up capital not required for the purposes of the company to the amount of 1*l.* 10*s.* on the footing that 1*l.* might be called up again.

The company was registered in 1884, with a capital of 80,000*l.* divided into 16,000 shares of 5*l.* each, in which 2*l.* 10*s.* had been paid up before the date of the resolution to reduce capital. The

articles of association contained the usual power for reduction of capital by special resolution.

At meetings of the company held on January 2 and February 2, 1906, the following special resolution was duly passed and confirmed:—

“That the capital of the company be reduced from 80,000*l.* divided into 16,000 shares of 5*l.* each, with 2*l.* 10*s.* each paid up thereon to 32,000*l.* divided into 16,000 shares of 2*l.* each, with 1*l.* each paid up thereon, and 1*l.* each uncalled; and that such reduction be effected by returning to the holders of the 16,000 shares which have been issued paid up capital to the extent of 1*l.* 10*s.* per share, and by reducing the nominal amount of each of such shares from 5*l.* to 2*l.*”

The minute proposed by the petition was substantially in the form approved by the judge and set out below.

R. J. Parker, for the petition. The evidence clearly proves that the capital which it is proposed to return is not wanted for the purposes of the company. The only difficulty arises from the decision of Buckley J. in *In re Calgary and Edmonton Land Co.* (1). There Buckley J. held that the Court could not approve a minute which stated that capital had been returned until this had actually been done. He therefore made a preliminary order confirming the reduction, and ordered the petition to stand over until the money had been paid, and then post-dated the order confirming the reduction and approving a minute. That is contrary to the established practice and I ask the Court not to follow it. Reductions have always been confirmed by a single order. The Companies Act, 1867, s. 9, provides that the resolution shall not take effect until the order is registered. Till then the directors have no authority to return the capital. Sect. 15 of the Companies Act, 1867, and s. 4 of the Companies Act, 1877, require the minute to shew what the capital will be as altered by the order and the amount “at the date of the registration of the minute proposed to be deemed paid up on each share.” That meets Buckley J.’s objection that the minute is not true till the money is paid. The new practice

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would lead to great difficulties if any shareholders could not be found or refused to receive the money or if there was an appeal from the order. [He referred to Palmer's Company Precedents, 9th ed. Part I. p. 1144-5.]

Cur. adv. vult.

June 1. SWINFEN EADY J. This is a petition for confirmation of the reduction of capital, involving a return to the shareholders of 1*l.* 10*s.* per share, upon the footing that 1*l.* may be called up again, the shares being reduced from 5*l.* to 2*l.* with 1*l.* paid.

Upon the evidence, I have no difficulty in making an order confirming the reduction.

A question, however, has been raised as to the form of the order and the minute.

It has recently been decided by Buckley J. in *In re Calgary and Edmonton Land Co.* (1) that the Court cannot make the order approving the minute stating the reduced capital, until the capital has in fact been reduced by the repayment, and that the proper procedure is to make the order confirming the reduction, and then allow the further hearing of the petition to stand over, until evidence has been produced that the capital to be paid off has actually been returned to the shareholders, and when this has been done to post-date the order confirming the reduction and approving a minute shewing with respect to the capital, as allowed by the order, the particulars required by s. 15 of the Companies Act, 1867, and s. 4 of the Companies Act, 1877.

That procedure has been objected to in the present case, and it was urged that the company had no right to make any repayment of capital to shareholders, until the sanction of the Court had been obtained, and the order drawn up, passed and entered and the minute registered.

By the Companies Act, 1867, s. 9, no resolution for reducing the capital of any company is to come into operation until an order of the Court is registered by the registrar of joint stock companies as thereafter mentioned. Sect. 15 provides that the registrar upon the production to him of an order of the Court confirming the reduction and the delivery to him of a

(1) [1906] 1 Ch. 141.

copy of the order and of a minute, (approved by the Court) shewing with respect to the capital of the company, as altered by the order, the amount of such capital, shall register the order and minute, and on the registration, the special resolution, confirmed by the order so registered, shall take effect. The certificate of the registrar is to be conclusive evidence that the capital of the company is such as is stated in the minute.

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By s. 4 of the Act of 1877 the minute required to be registered is to shew, in addition to the other particulars required by law, the amount (if any), at the date of the registration of the minute, proposed to be deemed to have been paid up on each share.

In my judgment the Acts clearly contemplate that the order of the Court and the registration of the minute are to precede any repayment of capital. The resolution for reduction does not come into operation until after order made and minute registered, and the company is not entitled to make any repayment of capital to shareholders except under and in pursuance of an effective resolution for reduction of capital. By s. 3 of the Act of 1877 the power to reduce capital includes a power to pay off any capital in excess of the wants of the company.

Again, the minute is to shew the capital as altered by the order and the amount "proposed to be deemed to have been paid up on each share." This means the amount which is proposed to be deemed to have been paid up after the alteration of the capital.

The Companies Acts do not contemplate two orders being made on a petition for reduction, one a preliminary order sanctioning the reduction and the other an order approving the minute after the reduction has been carried into effect.

Again, great difficulties in practice would arise, if there were to be one order drawn up and post-dated after the reduction had been carried out. Some shareholders might be abroad, or unable to be found, so that repayment of capital could not be made to them; others perhaps dead, without legal personal representatives; possibly there might be disputes existing as to the ownership of other shares; and the Acts do not contain any provisions for dealing with the amount payable to such persons,

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so as to make any particular disposition by the company of the amount of their capital equivalent to repayment to them.

Moreover, the company would be paying off capital, not only before the resolution had become effective, but before it was known whether there would be an appeal from the order confirming the reduction.

It is better to adhere to the practice which prevailed before the recent decision of Buckley J., and which is fully stated in Palmer's Company Precedents, 9th ed. Part I. pp. 1144-5, where numerous precedents of orders are referred to.

I make the order confirming the reduction in the usual form.

The minute will be as follows :—

The capital of the Lees Brook Spinning Company, Limited, is henceforth 32,000*l.*, divided into 16,000 shares of 2*l.* each, instead of the original capital of 80,000*l.* divided into 16,000 shares of 5*l.* each. At the time of the registration of this minute, the sum of 1*l.* and no more is proposed to be deemed to have been paid up on each share.

Solicitors : *Wrigley, Claydon & Trustram, Oldham.*

J. R. B.

In re TATTERSALL.
TOPHAM *v.* ARMITAGE.

[1905 T. 1131.]

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EADY J.

1905

Oct. 26.

Trustee—Investments—Nominal Debentures issued under Local Loans Act, 1875
(38 & 39 Vict. c. 83)—*Trustee Act, 1893* (56 & 57 Vict. c. 53), s. 1 (g);
s. 5, sub-s. 3; s. 50.

1906

May 31;
June 27.

The general statutory power of a trustee to invest in the debenture stock of a certain class of railways under s. 1 (g) of the Trustee Act, 1893, is not enlarged by s. 5, sub-s. 3, so as to enable him to invest in nominal debentures issued under the Local Loans Act, 1875, as the latter subsection is impliedly confined to the enlargement of express powers of investment.

ORIGINATING SUMMONS.

By his will dated December 6, 1884, a testator, after directing payment of his debts and making a specific bequest to his wife, devised and bequeathed his real and personal estate to his trustees upon trust for sale and conversion, and directed them to invest the proceeds "upon real securities in England or upon any such Government, parliamentary or other stocks, funds, debentures or other securities as trustees are by law authorized to invest trust funds upon, with power to call in or change such investments at their discretion."

The trustees were directed to appropriate certain legacies amounting to 60,000*l.* out of the trust funds upon trust for certain beneficiaries and their issue, and also 5,000*l.* apiece for the future-born children of Mary Ellen Topham and their issue.

The residue was bequeathed upon trust for the wife for life, with remainder in the events that happened for twelve residuary legatees and the after-born children of Mary Ellen Topham. The testator died on December 8, 1886, and his wife died on May 29, 1895.

Mary Ellen Topham was fifty-two years of age. She was married in 1871, and her last child was born in 1883, before the date of the will. She had no expectation of any more children.

SWINFEN The testator's residue, after appropriating the 60,000*l.*, amounted
EADY J. to 32,000*l.*

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TATTERSALL, This summons was issued by two of the residuary legatees
In re. asking that 1000*l.* apiece might be paid to the twelve residuary
TOPHAM legatees. This would leave 20,000*l.* to meet legacies of 5000*l.*
v. apiece, and shares of residue of 1000*l.* apiece, for three possible
ARMITAGE. future children of Mary Ellen Topham, and a balance of 2000*l.*
— for costs.

On October 26, 1905, an order was made directing an inquiry whether any and what appropriations had been made in respect of the legacies, and an inquiry of what the residuary estate, after proper appropriations for legacies, consisted.

In the course of the inquiry the question arose whether certain appropriations were authorized.

It appeared, for instance, that one 10,000*l.* settled legacy had been invested by the trustees on a Bradford Corporation mortgage for that amount dated October 14, 1904, and made under the Bradford Improvement Act, 1850 (13 & 14 Vict. c. lxxix.), which incorporated the Public Health Act, 1848 (11 & 12 Vict. c. 63). The mortgage followed (*mutatis mutandis*) the form in Schedule C of the Public Health Act, 1848, and mortgaged the rates to the trustees, their executors, administrators, and assigns under ss. 107, 111. The principal could not be called in or repaid until the expiration of three years from October 1, 1904. The question whether this (*inter alia*) was an authorized investment was referred to the judge.

J. G. Wood, for the trustees. The Bradford Corporation mortgage is an authorized investment. The Local Loans Act, 1875, s. 4 provides that "a local authority shall be deemed to borrow, subject to the provisions of this Act, whenever it raises a loan by the issue of debentures . . . purporting to be created under its powers." Sect. 5 provides that "a debenture under this Act shall be an instrument taking effect as a deed, and charging the local rate or property in such debenture specified with payment, as in the debenture mentioned, of the principal sum and interest therein specified. . . . A debenture in which the principal sum is made payable to a person named therein,

his executors, administrators, or assigns, is in this Act referred to as a nominal debenture." Sect. 27 provides that "any trustees . . . authorized . . . to invest any moneys in the debentures or debenture stock of any railway or other company shall, unless the contrary is provided by the instrument authorizing . . . such investment, have the same power of investing such moneys in any nominal debentures or nominal debenture stock issued under this Act as they have of investing such moneys in debentures or debenture stock of any railway or other company as aforesaid."

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In *In re Maberly* (1) it was held that the power of investing capital money under s. 21 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), "on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock, of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares" did not authorize an investment under s. 27 of the Local Loans Act, 1875, unless it was shewn that the corporation had paid a dividend for ten years. This decision turned on the words "the same power of investing" in s. 27, though it is difficult in any case to see how a corporation could pay a dividend on its ordinary stock or shares.

Sect. 27 is repealed by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 51. Now s. 1 of the Trustee Act, 1893, provides that "a trustee may, unless expressly forbidden by the instrument (if any) creating the trust, invest any trust funds in his hands— . . . (g) In the debenture . . . stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum per annum on its ordinary stock." Sect. 5, sub-s. 3, which replaces s. 27 of the Local Loans Act, 1875, provides that "a trustee having power to invest money in the debentures or debenture stock of any railway or other company may, unless the contrary is expressed in the instrument authorizing the investment, invest in any nominal debentures or

(1) (1886) 33 Ch. D. 455, 459.

- * SWINFEN EADY J. 1906
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 —
- nominal debenture stock issued under the Local Loans Act, 1875." The words "the same power of investing," on which *In re Maberly* (1) turned, are omitted in this sub-section.
- [SWINFEN EADY J. Sect. 4 makes the first three sections applicable to trusts created before the passing of the Act; but there is no such provision as to s. 5. The points on s. 5, sub-s. 3, really are: (1.) Does the sub-section apply to trusts created before the passing of the Act? (2.) Does it not refer to an express power in the instrument authorizing the investment? It refers to a trustee having power to invest in "debentures or debenture stock," whereas s. 1 (g) only gives power to invest in debenture stock. (3.) If the sub-section includes statutory powers of investment, does "any railway" mean "all railways," or is the power to invest in the debenture stock of a limited class of railways under s. 1 (g) sufficient? (4.) Is the sub-section limited to corporations with a population over 50,000 under s. 1 (m)?]

(1.) In s. 5, sub-s. 1, the words "having power to invest" clearly apply to trusts created before the passing of the Act, because that sub-section provides that a trustee "having power to invest" in real securities may invest, "and shall be deemed to have always had power to invest," on certain chattel real securities and statutory charges. The words are therefore presumably retrospective in the other sub-sections.

(2.) The expression "instrument" includes Act of Parliament: s. 50. The sub-section means that a trustee who has power to invest in debentures or power to invest in debenture stock may, unless the contrary is expressed in the instrument or Act of Parliament authorizing the investment, invest in nominal debentures or nominal debenture stock. Settled Land Act trustees are authorized to invest in debentures: Settled Land Act, 1882, s. 21, sub-s. (i); so that s. 5, sub-s. 3, need not necessarily refer to express powers.

(3.) So long as a trustee has power to invest in the debenture stock of any one or more railway companies s. 5, sub-s. 3, applies. It is not necessary that the power should include all railway companies. In the same way a trustee would be "a trustee

having power to invest in real securities" within s. 5, sub-s. 1, although they were confined to securities in England, and although the two-thirds rule would apply to the investment. If the words "any railway" mean "all railways," the sub-section would be of little use, as no statutory power and very few express powers would give such an unlimited range of investment as "the debentures or debenture stock of all railways or other companies."

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(4.) Sect. 1 (*m*) only refers to nominal or inscribed stock, and not debentures. The expression "stock" might possibly include "debentures" under s. 50, so far as relates to vesting orders, but it would not otherwise include them. Sect. 5, sub-s. 3, is therefore not limited by s. 1 (*m*). In any case the population of Bradford is considerably over 50,000.

T. T. Methold, for the residuary legatees, adopted the same argument.

Cur. adv. vult.

June 27. SWINFEN EADY J. (after stating the point). The mortgage in question fulfils the requirements of the Local Loans Act, 1875, and is, therefore, a nominal debenture. But the question is, Can trustees of this will invest in nominal debentures issued under the Local Loans Act, 1875? Sect. 27 of that Act, enabling trustees with certain powers of investment to invest in loans under that Act, was repealed by s. 51 of the Trustee Act, 1893, but was re-enacted by s. 5, sub-s. 3, of the same statute, with a verbal modification.

It was decided by Bacon V.-C. in *In re Maberly* (1) that trustees having the powers of investment authorized by s. 21 of the Settled Land Act, 1882—that is to say, entitled to invest in the debentures or debenture stock of any railway company "having for ten years next before the date of investment paid a dividend on its ordinary stock or shares"—may not invest in debentures or debenture stock issued by a local authority under the Local Loans Act, 1875. This decision, however, does not determine the present case, as the Vice-Chancellor laid stress upon the words "have the same power of investing" which occur

(1) 33 Ch. D. 455, 459.

SWINFEN in s. 27 of the Local Loans Act, 1875, but are not repeated in
EADY J. s. 5, sub-s. 3, of the Trustee Act, 1893.

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—

The trustees of this will have not any express power of investing in these nominal debentures, and can only do so if they come within s. 5, sub-s. 3, of the Trustee Act, 1893.

In order to bring them within this sub-section it was contended that under the Trustee Act, 1893, s. 1 (*g*), as they are not expressly forbidden by the instrument creating the trust, they may invest in the debenture stock of any railway in Great Britain or Ireland, incorporated by special Act of Parliament, and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum per annum on its ordinary stock, and that the trustees are therefore trustees "having power to invest money in the . . . debenture stock of any railway . . . company" within s. 5, sub-s. 3. It may be doubted whether trustees having power to invest in the debenture stock of certain railway companies only, namely, those falling within a particular category, have power to invest in the debenture stock of "any" railway company within s. 5, sub-s. 3; but the true answer to the argument is that s. 5, sub-s. 3, extends only to trustees having express power in the instrument authorizing the investment; that it is an enlargement of that express power, and not a further enlargement of the general powers conferred by s. 1.

Sect. 5, sub-s. 3, assumes the existence of an instrument authorizing the investment in railway debentures or railway debenture stock. Again, the powers conferred by ss. 1, 2, 3 are by s. 4 extended to trusts created before the passing of the Act, and are to be in addition to the powers conferred by the instrument (if any) creating the trust. There is no such provision as to the powers in s. 5.

Moreover, if all trustees, unless forbidden, are to have the power of investing in nominal debentures, I see no reason for separating this power from the other powers comprised in s. 1.

Sect. 5 is a re-enactment of provisions extracted from six different Acts of Parliament, and is difficult to construe, as there does not appear to be any uniformity in its several parts. But in my opinion s. 5, sub-s. 3, is an enlargement of express powers,

as distinguished from general statutory powers, like s. 5, sub-s. 4, dealing with “a trustee having power to invest money in securities in the Isle of Man,” which obviously refers to a trustee having express power so to do. I arrive at this conclusion on the construction of the various sections of the Act, notwithstanding that the word “instrument” includes “Act of Parliament” in the definition clause, s. 50.

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I may add that the provision in Order xxii., r. 17, of the Rules of the Supreme Court, enabling cash under the control of the Court to be invested in “nominal debentures under the Local Loans Act, 1875, ... provided in each case that such debentures shall not be liable to be redeemed within a period of fifteen years from the date of investment,” does not avail the applicants, as all the nominal debentures in question on this application are liable to be redeemed within a period of fifteen years from the date of investment. I therefore determine that the mortgage of rates by the Bradford Corporation is not an authorized investment.

The matter will go back to chambers with this declaration.

Solicitors: *Nussey & Fellowes, for Vint, Parkinson, Hill & Killick, Bradford.*

G. R. A.

C. A.

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KEKEWICH

J.

Oct. 25, 26.

1906

C. A.

June 13, 14.

FEAR v. MORGAN.

[1903 F. 565.]

Light—Prescription—Dominant and Servient Tenements held under common Landlord—Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 3.

Under s. 3 of the Prescription Act, 1832, where two adjoining tenements are held by different lessees under a common landlord and one lessee has enjoyed the access and use of light in respect of his tenement over the other tenement for a period of twenty years without interruption, he acquires an absolute and indefeasible right to light as against that other tenement, and this right enures in favour of that lessee and his successors, not only as against the adjoining lessee, but as against the common landlord and all succeeding owners of the adjoining tenement:—

So held by the Court of Appeal, affirming Kekewich J.

Frewen v. Philipps, (1861) 11 C. B. (N.S.) 449, and *Mitchell v. Cantrill*, (1887) 37 Ch. D. 56, which establish this proposition, are recognized as authorities by the Court of Appeal in *Wheaton v. Maple & Co.*, [1893] 3 Ch. 48, and are not impliedly overruled by *Colls v. Home and Colonial Stores Ltd.*, [1904] A. C. 179.

THIS action was brought for an injunction and damages in respect of an obstruction of the plaintiffs' ancient lights.

The plaintiffs Mr. and Mrs. Fear were in occupation of certain premises known as No. 16, North Parade, Aberystwith, under a lease dated June 30, 1900, for a term of twenty-one years. The defendant Mrs. Morgan was the lessee of the adjoining house No. 18. In the back of the plaintiffs' premises were two windows, which looked on to a wall about seven feet high forming part of the defendant's premises, and which for more than twenty years before the commencement of this action had enjoyed access of light over the defendant's premises uninterrupted except by this wall. In 1903 the defendant raised the wall to the height of sixteen feet, and thereby caused a substantial interference with the light previously enjoyed by the plaintiffs' premises.

By a lease dated November 24, 1825, both the plaintiffs' and defendant's premises were (together with other premises) demised by the corporation of Aberystwith to Mary Davies for a term of ninety-nine years. In 1827 the plaintiffs' premises were severed

from the defendant's and eventually No. 16, North Parade became vested in John Watkins, jun., and No. 18 in Frances Davies for the residue of the term. In April, 1900, Watkins, who had then been in uninterrupted enjoyment of the lights in question for more than twenty years, surrendered his interest in No. 16 to the corporation, and on May 1, 1900, he obtained from the corporation a new lease thereof for a term of seventy-five years. This lease he subsequently assigned to the plaintiffs' lessors. In March, 1903, Frances Davies assigned her interest in No. 18 to the defendant Mrs. Morgan, who shortly afterwards surrendered the premises to the corporation and obtained from them a new lease thereof for a term of seventy-five years.

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For many years past the corporation, who were the ground landlords of the greater part of the property in the town, had encouraged their lessees to apply for a renewal of their leases with a view to enabling them (the corporation) to give effect to a scheme for the improvement of their house property, which included their property in North Parade. Each application for renewal was referred to the finance committee, who, after visiting the premises, reported to the council the terms and conditions upon which they recommended a renewal. Watkins was a member of the finance committee from 1894 to 1897, and was well aware of the general policy of the council at the time when he surrendered his lease in 1900, and he had also a general knowledge of the improvements which the council desired to have carried out with respect to No. 18. The renewal of the lease of the defendant's premises was granted upon the terms of her making certain structural alterations, which caused the obstruction of light complained of in this action.

The defence raised the question of law whether any right to light could be acquired under the Prescription Act, 1832, or otherwise by one lessee against another where both the dominant and the servient tenements were held under a common landlord, and it also raised the further question whether in the circumstances of the case, and especially having regard to the knowledge acquired by Watkins as a member of the finance committee, the surrender by Watkins of his lease did not operate as a release of any right to light he might previously have

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enjoyed over the defendant's premises. The circumstances attending the surrender of Watkins's lease are fully set out in the judgment.

The obstruction was admitted, and, subject to the determination by the Court of the questions raised by the defence, it was arranged that the case should be sent to an official referee to inquire as to the damages, the plaintiffs not insisting upon their claim for an injunction.

The action came on for hearing before Kekewich J. on October 25, 1905.

P. O. Lawrence, K.C., and *Dunham*, for the plaintiffs.

Stewart-Smith, K.C., and *L. F. Potts*, for the defendant.

[The following cases were cited:—*Frewen v. Philipps* (1); *Mitchell v. Cantrill* (2); *Robson v. Edwards* (3); *Wheaton v. Maple & Co.* (4); *Colls v. Home and Colonial Stores, Ltd.* (5); *Birmingham, Dudley and District Banking Co. v. Ross* (6); *Godwin v. Schweppes, Ltd.* (7)]

KEKEWICH J. The real question to be determined in this case is whether what occurred in 1900 in anywise altered the position of John Watkins, jun., or those now claiming under him. I say the real question, and to my mind that is the only question requiring determination. But it is necessary to deal with some subordinate questions, and in order to determine the real question it is obviously necessary to say what was the position of affairs in 1900. John Watkins, jun., or his predecessors in title, had then been for twenty years and upwards in uninterrupted enjoyment of light passing through the two windows in question over the land of the defendant or those whom the defendant now represents. It seems to me to be immaterial for the present purpose to consider whether he had an absolute and indefeasible right then to the light, or whether he had only an unanswerable plea in law if the claim to the

(1) 11 C. B. (N.S.) 449.

(2) 37 Ch. D. 56.

(3) [1893] 2 Ch. 146.

(4) [1893] 3 Ch. 48.

(5) [1904] A. C. 179.

(6) (1888) 38 Ch. D. 295.

(7) [1902] 1 Ch. 926.

right had been called in question. I accept, of course, at once the conclusion of Lord Macnaghten in *Colls v. Home and Colonial Stores, Ltd.* (1), which has been cited on behalf of the defendant, that the proper construction of the Act is that no right is acquired until that right is called in question. Lord Macnaghten calls it an inchoate right. But as soon as it is called in question then the right arises, it can be pleaded then as a right, and if the question had arisen in 1900 whatever the right was would then have been established. I pass that by without more, because, as Lord Macnaghten himself says, the point is of little or no practical importance. The important fact is that in 1900 Watkins had been in uninterrupted enjoyment of these lights for twenty years and upwards.

It is said that that would not have given him a complete answer under the statute to anyone who contested his claim, and that argument rests entirely on the somewhat strange position which we have here. Both the plaintiffs and the defendant—I use those words as of course meaning those who preceded them as well as themselves—claim under one common landlord, and not only under one common landlord, but under one common lease granted by that common landlord, and it is said that where that occurs one of the lessees cannot claim to acquire a right of light as against the other—that he cannot claim it against the common landlord. Now, as regards that, it is unnecessary for me to consider any authorities except those which have been cited, which seem to me to conclude the question altogether. In *Frewen v. Philipps* (2) the question arose respecting two leases by a common landlord, and that also occurred in some of the other cases cited. I cannot myself see any material distinction between two grants made by a common landlord by different instruments and one grant made by the same common landlord and afterwards severed, so that the two properties are held by different persons though under the same lease and under the same landlord. I will not say no attempt has been made to insist upon the distinction, but no argument has been adduced to me to shew that the distinction is of any importance whatever. *Frewen v. Philipps* (2) seems to me to have decided the point

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(2) 11 C. B. (N.S.) 449.

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with which I am now dealing, and on which, therefore, I simply accept that decision. It is not necessary for me to go into *Frewen v. Philipps* (1) in order to shew that it decided the point, because I have the highest authority short of the House of Lords for that conclusion. In *Wheaton v. Maple & Co.* (2) Lindley L.J., speaking of *Frewen v. Philipps* (1), says: "In that case the plaintiff had acquired the easement he claimed, not only against the defendant, the adjoining tenant, but also against his lessor, although the plaintiff and the defendant both held under the same landlord." *Wheaton v. Maple & Co.* (2) is itself an illustration, and a strong illustration, of the same conclusion. There the landlord was the Crown. If it had been possible to bind the Crown it was assumed throughout the judgments in that case that there would have been an indefeasible right acquired against the lessee. The Crown not being bound by the Prescription Act, it was impossible to bind the lessee, because the right, if acquired, must be acquired against all, and could not, as was pointed out in the judgments, be acquired for a term of years. But the converse was recognized as necessarily true, and the reasoning of the judges turned entirely on the question whether the Crown was bound or not. The other two Lords Justices who took part in that judgment, Lopes L.J. and A. L. Smith L.J., both concurred with Lindley L.J. in their references to *Frewen v. Philipps* (1), and I must take it without more that *Frewen v. Philipps* (1) is a distinct authority that in a case such as this it was possible for the lessee of No. 16, North Parade to acquire, when the proper time came for saying he had acquired it, an indefeasible right to light, not only against the tenant of No. 18, but also against the landlord of No. 18, who happened to be also the landlord of No. 16. I have said that there is no doubt that up to that time, Mr. Watkins had had the uninterrupted enjoyment of the light, and therefore, if it had been called in question then, he would have been able to rely on the statute, and to say that the right had been acquired. It was not called in question then. Nothing has occurred since, except that which is to be presently mentioned as insisted upon by the defence here, to destroy the

(1) 11 C. B. (N. S.) 449.

(2) [1893] 3 Ch. 48, 65.

benefit to him of that uninterrupted enjoyment, and therefore at the time when this action was commenced, and the question being raised, the right had been acquired. That seems to me the position in 1900—an inchoate right, but inchoate because not then called in question, the right maturing and being capable of being pleaded when this action commenced, because the commencement of the action contested his claim.

The next question is, How far, if at all, did the events which happened in 1900 affect the inchoate right which afterwards matured? From 1894 to 1897 Mr. John Watkins, jun., was a member not only of the council, but of the finance committee, who looked after the buildings of the town, and it may be taken that he knew what their policy was with regard to those buildings. More than that, he knew perfectly well what was being done with reference to the houses in the North Parade. He knew that uniformity had been insisted upon so far as it could be insisted upon. He knew that in some cases that had proved impossible; he knew that, where a house was altogether so rotten that it had to be demolished and a new house had to be erected in its place, terms could be insisted upon, and were insisted upon, quite different from those where alterations or repairs were required. More than that, he knew precisely what was going on as regards No. 18. He had a personal interest in No. 18. He desired to acquire part of the land which was held under the lease of No. 18, and he knew that the application for renewal of the lease had been in the first instance rejected, because Mrs. Davies declined to give up that spot of ground which Mr. Watkins desired to have for himself. He anticipated, and anticipated with truth, and no doubt for sound reasons, that Mrs. Davies would have to give way sooner or later, and that eventually she would have to accede to the terms offered to her by the finance committee. Being acquainted with all these things, he himself took a new lease of his house No. 16.

Now it is unimportant to my mind to determine the exact facts as regards his tenure of the property. He had a lease of No. 16 of which there were many years to run; he might, of course, have taken a new lease without a surrender, and the legal effect

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on his tenure would have been that he would still have held as lessee, and would have held under the conditions of the old lease, subject to such new conditions as might have been agreed upon between him and the council. But it did not seem good to him and the council to deal with the matter in that way. Probably both parties were well advised to approach it in rather a different way; therefore he surrendered his lease. We have not got the old lease; I am told it was without conditions or covenants at all. He surrendered his lease to the intent that a new lease might be granted, and a new lease was granted the next day, really, of course, contemporaneously and as part of the same transaction. It seems to me immaterial to consider whether he really is now in by virtue of a prolongation of his old lease, or whether he came under an entirely new lease in 1900. Let the latter be supposed to be the correct view, not only in law, but in fact and for all practical purposes. In 1900 Mr. Watkins accepts a new lease of these premises. What did that lease confer? I will take the description of it, as regards this point, from North J.'s judgment in *Robson v. Edwards* (1), quoting his language, but without forgetting the correction of the current phrases of the day made by Lord Macnaghten in *Colls v. Home and Colonial Stores, Ltd.* (2): "When twenty years had run, the right was acquired absolute and indefeasible in respect of the access of light to that house; and when the house was leased afterwards, the right given by law passed with it, not by reason of the lease, though, no doubt, the person who became tenant went in under the lease; but he did not get the grant to the light by the lease in any sense. He got the house by the lease, and the law gave the tenant, the occupier of the house, the right to the enjoyment of that light at that time." That is to say, Mr. Watkins, by the lease of 1900 got the house with, to use the expression used before, the inchoate right to the light. He got the benefit of the uninterrupted enjoyment up to that time which, when challenged, might be converted into an absolute indefeasible right. That being so, it was of course competent to him to say that he would not insist upon it. He could have contracted himself, either by conduct or by words, out of that right. He could

(1) [1893] 2 Ch. 146, 150.

(2) [1904] A. C. 179.

have taken the house, if he so pleased, without any right to insist upon the access of light. There are authorities which shew that where a man takes a lease where access of light may be important, and that afterwards comes in question, the Court must look at the surrounding circumstances to see whether as a matter of fact, as a matter of inference, he did or did not insist upon having that light, and whether he is now entitled to insist upon it. The leading authority upon that subject is *Birmingham, Dudley and District Banking Co. v. Ross*. (1) I do not propose to go into that again, because for my purpose all that is necessary to be said about it is said by Joyce J. in *Godwin v. Schweppes, Ltd.* (2) He says: "But in the very important case of *Birmingham, Dudley and District Banking Co. v. Ross* (1) it was determined that, although a grantor shall not derogate from his own grant, this rule does not entitle the grantee of a house with the lights, under the words imported into the grant by the Conveyancing Act, 1881, to any easement of light to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant and known to the grantee." In applying that one must bear in mind that here we have no question of a grantor derogating from his own grant. If I am right in the position existing in 1900, there was no implied obligation, nothing arising from any maxim that the grantor shall not derogate from his own grant, but a right acquired in this sense, that it was not an absolute right, but a right which might have been insisted upon at any moment when challenged. It seems to me one should be more careful in considering questions of conduct and inference where that is the case than where the question is merely one of implied obligation. I have stated what Mr. John Watkins' position was in 1900. Could it reasonably be inferred from that evidence that he ought to have anticipated that No. 18 would be rebuilt or altered so as to obstruct his light, and must be taken to have accepted his lease of 1900 on the faith of that anticipation? It seems to me that is pushing inference very much too far. I am asked to infer that Mr. Watkins in 1900 took the new lease with the liability to have the windows, which he and his predecessors had enjoyed for twenty

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(1) 38 Ch. D. 295.

(2) [1902] 1 Ch. 926, 933.

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years and upwards, obstructed by new premises. That inference appears to me to be far in excess of anything which can be fairly inferred from the facts. I think it impossible to say that any notion of that kind ever entered into his mind. I therefore declare that, notwithstanding the surrender and grant of a further lease, the plaintiffs, as owners of No. 16, are entitled, as appurtenant to that house, to an absolute and indefeasible right to the access and use of light in respect of the windows in question in the action.

C. A. The defendant appealed. The appeal came on for hearing on June 13, 1906.

Warmington, K.C., and *L. F. Potts*, for the appellant. The termor of No. 16 never acquired any easement of light as against No. 18. An easement of light, although the subject of special provisions in the 3rd section of the Prescription Act, 1832, is still an easement. It is a right in the owner of the dominant tenement over the servient tenement. It is a right over property, and not against persons, and it cannot arise except where the owners of the dominant and servient tenements are different persons. For this purpose there is no difference between an easement of light and any other easement, and, in the case of an ordinary easement, one termor cannot acquire by prescription against another termor where both the properties belong to the same reversioner. The Act has not created a class of easements which could not be gained by prescription at common law, or, in other words, has not created an easement for a limited time only or available only against particular owners or occupiers of the servient tenement: *Wheaton v. Maple & Co.* (1), per Lindley L.J., approving *Bright v. Walker*. (2) *Bright v. Walker* (2) was the case of a right of way, but Lindley L.J. treated the reasoning of Parke B. in that case as equally applicable to a right to light. It will not be disputed that an easement of light could not have been acquired at common law under circumstances like the present. *Wheaton v. Maple & Co.* (1) was a decision of this Court, and the effect of it is to overrule by implication *Frewen v.*

(1) [1893] 3 Ch. 48, 65.

(2) (1834) 1 C. M. & R. 211.

Philipps (1), *Mitchell v. Cantrill* (2), and *Robson v. Edwards* (3), which are adverse to the appellant's contention.

[FLETCHER MOULTON L.J. Those cases are referred to by Lindley L.J. in *Wheaton v. Maple & Co.* (4) without disapproval.]

His observations as to those cases are inconsistent with the preceding part of his judgment, and are not well founded. We also rely on *Colls v. Home and Colonial Stores, Ltd.* (5), where the right to light under the Prescription Act is spoken of as an easement, and it is laid down as the result of the authorities that the Act has made no difference in the right conferred, but is merely concerned with the mode of proof. *Kilgour v. Gaddes* (6) is also in point, unless a distinction can be drawn between a right of way and a right to light.

[VAUGHAN WILLIAMS L.J. referred to Goddard on Easements, 6th ed. p. 258, n., where *Frewen v. Philipps* (1), *Mitchell v. Cantrill* (2), and *Robson v. Edwards* (3) are justified by reason of the special language of s. 3 of the Prescription Act.]

Further, in the circumstances of this case Watkins must be taken to have released his right to light.

P. O. Lawrence, K.C., and *Dunham*, for the respondents.

VAUGHAN WILLIAMS L.J. In this case there are two questions raised : first, whether the principle laid down by Parke B. in *Bright v. Walker* (7) in respect of a right of way applies also to the case of a right of light under s. 3 of the Prescription Act, 1832; secondly, whether, assuming that the authorities have established, or purported to establish, the proposition that the Prescription Act, in respect of the acquisition of easements, has conferred new rights which did not exist at common law, those authorities are, as is contended on behalf of the appellant, impliedly overruled by the case of *Colls v. Home and Colonial Stores, Ltd.* (5) in the House of Lords. Without going into the matter in any greater detail at present, I think I may say that substantially it is admitted that the right of light

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(1) 11 C. B. (N.S.) 449.

(2) 37 Ch. D. 56.

(3) [1893] 2 Ch. 146.

(4) [1893] 3 Ch. 48.

(5) [1904] A. C. 179.

(6) [1904] 1 K. B. 457.

(7) 1 C. M. & R. 211, 221-2.

C. A. now claimed by one lessee of the corporation against another
1906 could not have been claimed at common law.

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I will deal first with the second question, viz., as to the effect of the decision of the House of Lords in *Colls v. Home and Colonial Stores, Ltd.* (1), or to speak accurately, not the decision, because the decision does not touch the question, but the observations of the learned Lords who took part in that decision. The best passage relied on by Mr. Warmington is that which occurs in the address of Lord Halsbury, where he says this (2): "The statute upon which reliance is placed in this case illustrates the danger of attempting to put a principle of law into the iron framework of a statute. The statute literally construed by the use of the words 'the light' would mean all the light which for twenty years has existed in the surroundings of the tenement which has enjoyed it; yet, singularly enough, there has been a complete uniformity of decision upon the construction of the statute that it has made no difference in the right conferred, but is only concerned with the mode of proof; but, though I quite concur with this construction, which is supported by an overwhelming body of authority, yet I cannot but think the language of the statute has led to some of the decisions which your Lordships are now called upon to review." It is said that because Lord Halsbury states as the result of the authorities that the statute has made no difference in the right conferred, but is only concerned with the mode of proof, we ought to consider that all those intervening cases which have held that under the Prescription Act rights may be established in respect of light which could not have been established before the Prescription Act have been overruled. I cannot think that Lord Halsbury, if he had intended that, would not have said so in plainer terms. It is quite true that the authorities in question were not discussed at any length, so far as I can see, in the House of Lords. That is a fact which perhaps may be said to cut both ways, because it might be said that the reason why the authorities were not discussed was that everybody assumed the truth of the proposition which Lord Halsbury has stated in the passage

(1) [1904] A. C. 179.

(2) [1904] A. C. 183.

which I have read, but I do not think that that is the proper view. I think the proper view is that Lord Halsbury could not have intended to overrule all those cases without making a specific allusion to the fact that he was doing so. It is said that the addresses of the other learned Lords repeat in substance the view supposed to be thus expressed by Lord Halsbury. I do not think they do, and more than that I think that the address of Lord Lindley leads to the conclusion that he personally did not think that those cases had been overruled, because speaking of s. 3, which deals with the access of light, he says this (1): "Again, your Lordships will observe that nothing is said about enjoyment as of right; and notwithstanding s. 5 of the Act, which refers to enjoyment as of right, it was early decided that as regards light claimed under s. 3 enjoyment as of right need not be alleged or proved, and that the right, whatever it may be, is acquired by twenty years' use and enjoyment without interruption and without written consent: see *Truscott v. Merchant Taylors' Co.* (2) and *Frewen v. Philipps*." (3) *Frewen v. Philipps* (3) is the first authority for the proposition that in respect of the right to light the enjoyment for the twenty years will, even in the case of the possession of lessees from a common lessor, create a right of light not only as between the lessees themselves, but as between the dominant tenement and everybody else owning at any time the servient tenement. I do not think I should be serving any useful purpose if I went through all the authorities at length.

I propose next to deal with the case of *Wheaton v. Maple & Co.* (4), and I will read a portion of the judgment of Lindley L.J. He says (5): "I come now to the last question, viz., whether s. 3 has conferred an easement as against the Crown's lessees. So far as mere language is concerned, and apart from the nature of the subject-matter with which the section is dealing, I should see no difficulty in applying s. 3 to all English subjects, whether lessees of the Crown or other people; I should see no

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(1) [1904] A. C. 205.

(3) 11 C. B. (N.S.) 449.

(2) (1856) 11 Ex. 855.

(4) [1893] 3 Ch. 48.

(5) [1893] 3 Ch. 64.

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difficulty in reading 'absolute and indefeasible' as meaning absolute and indefeasible as against all persons to whom the section is applicable. But if the section is so read, the consequence will necessarily be to create, by mere occupation and enjoyment, a class of easements which at common law could never have been acquired by prescription, but only by express agreement or grant." That really is the present case. "An easement for a term of years may, of course, be created by grant; but such an easement cannot be gained by prescription, and, not being capable of being so acquired, it does not fall within the scope of the statute 2 & 3 Will. 4, c. 71. The expression 'absolute and indefeasible,' as applied to easements of all kinds, coupled with the declared object of the Act, which is to shorten the time for prescription, shews that the easements dealt with were easements appendant or appurtenant to land, and which, when acquired, imposed a burden for ever on the servient tenement. This view of the statute was clearly expressed soon after it passed in *Bright v. Walker* (1), and although some passages in Baron Parke's judgment in that case have been criticized, and even dissented from, the broad view which underlies the judgment has never been disapproved. That view, as I understand it, is that the Act has not created a class of easements which could not be gained by prescription at common law, or, in other words, has not created an easement for a limited time only, or available only against particular owners or occupiers of the servient tenement. Such easements can only be created since the Act as before the Act—viz., by grant or by an agreement enforceable in equity, which for most purposes is as efficacious as a deed under seal. Such a grant or agreement must, moreover, be proved as a fact and not be purely fictitious. It was contended that *Bright v. Walker* (1) is inconsistent with *Frewen v. Philipps* (2); but this is a mistake attributable to the wording of the head-note in the later case. In that case the plaintiff had acquired the easement he claimed, not only against the defendant, the adjoining tenant, but also against his lessor, although the plaintiff and the defendant both held under the same landlord. Similar observations apply to

(1) 1 C. M. & R. 211,

(2) 11 C. B. (N.S.) 449.

Mitchell v. Cantrill (1) and to *Robson v. Edwards*.” (2) Now certainly in that case Lindley L.J. is saying in very straight language that *Frewen v. Philipps* (3) and *Mitchell v. Cantrill* (1) and *Robson v. Edwards* (2) are good law, and, as it seems to me, is meaning to affirm the proposition that by the peculiar wording of s. 3 and by the omission in that section of the words “as of right,” a right of light can be gained under the Prescription Act which could not have been gained at common law prior to the Prescription Act. If the conclusion which we have come to as to the effect of *Colls v. Home and Colonial Stores, Ltd.* (4) is right—I mean if it is right to say that the observations of the learned Lords leave unaffected the prior decisions in respect of the acquisition of the right of light—then we have in the case of *Wheaton v. Maple & Co.* (5) a decision by this Court which binds us, and which we have no right to depart from. In that case of *Wheaton v. Maple & Co.* (5) the fact was that the owner in reversion was the Crown; and the result of that was this, that however much it might have been decided in *Frewen v. Philipps* (3) and *Mitchell v. Cantrill* (1) that in respect of a right of light a right could be acquired by one lessee against another, in the case where the servient tenement was occupied by one lessee and the dominant tenement by another, and acquired in such a way as to bind the reversioner, the proposition established by those decisions was not directly involved in the conclusion arrived at in that case; but that proposition was nevertheless affirmed by that case, and, that decision not being overruled, we are bound by it.

But although I think that this decision binds us, and I also think that *prima facie* *Frewen v. Philipps* (3), which was a decision by the Exchequer Chamber, at that time the last Court of Appeal before the House of Lords, is a decision which we ought to follow, yet I think it right just to look at these three cases which have been referred to by Lindley L.J. to see whether they do really establish the proposition which he assumes that they establish. I propose first to look at the report of

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Frewen v. Philipps. (1) In that case the marginal note is this: "The plaintiff and defendant occupied houses adjoining each other as tenants under leases both of which were granted by the same lessor on the same day, viz., the 18th of December, 1788, and both expiring at the same time. The defendant by building on his own premises obstructed a window in the house of the plaintiff though the latter had had an uninterrupted enjoyment of light and air for more than twenty years:—Held, that the circumstance of the two houses being held under the same landlord, and for the same term, did not prevent the one tenant from acquiring an indefeasible right to light as against the other." It is said that the marginal note suggests that the Court of Exchequer Chamber only decided that there was a right under those circumstances as between the two lessees, and that there was no decision that the right thus acquired during the continuance of these two leases would bind the common lessor. Lindley L.J. in *Wheaton v. Maple & Co.* (2) says that that inference is incorrect, and that it is probably attributable to the wording of this head-note. He means by that that he thinks that, so far from deciding that the right would exist as between the two lessees only, it decided that it would bind the land and would therefore bind the reversioner. One has to turn to the judgment to see how this is, and I observe before I read it that no one can read the arguments of Mr. Garth on the one side and Mr. O'Malley on the other without seeing that the question was argued plainly enough before the Court whether or not the landlord, the reversioner, would be bound by the right to light which it was held was acquired. Pollock C.B., after citing from *Truscott v. Merchant Taylors' Co.* (3) a portion of the judgments of Coleridge J. and Cresswell J. respectively, in which the absence of the words "as of right" in the 3rd section was particularly dealt with, finishes his judgment by saying (4): "Although that is not precisely the case now before the Court, yet it recognizes the intention of the Legislature to adopt a simple and short period for the acquisition of the right to light, and that the enjoyment need not be *as of right*. It may be, that, if a man opens a light towards

(1) 11 C. B. (N.S.) 449.

(2) [1893] 3 Ch. 48.

(3) 11 Ex. 855.

(4) 11 C. B. (N.S.) 455.

his neighbour's land, the reversioner may have no means of preventing a right thereto from being acquired by a twenty years' enjoyment, unless he can prevail upon his tenant to raise an obstruction, or is able to procure from the other party an acknowledgment that the light is enjoyed only by consent. For the reasons above stated, however, we think the direction of the Lord Chief Justice was right." Now, I think that when one looks at that passage in *Frewen v. Philipps* (1) Lindley L.J. was quite right in treating the judgment as saying positively that this user of the premises and of the light during the time when both the servient and the dominant tenements were under lease from a common lessor did create a right to light which would bind the reversioner. When one looks back a little further in this same judgment Pollock C.B. says: (2) "The 3rd section does not say, 'when the access and use of light shall have been enjoyed *as of right*'; because every person has a right to so much light as can come in at his windows." As I understand, Pollock C.B. is treating the words "as of right" as meaning really openly and without anyone's consent, and then he says that in respect of the acquisition of a right to light neither of those characteristics of the term "as of right" has any application, because really the right to light as is there stated is a right to so much light as can come in at the windows, and there is no question of gaining that right by anything that is done nor any question of permission at all. That, at all events, is the decision, and it is followed by *Wheaton v. Maple & Co.* (3) Then we come to the case of *Mitchell v. Cantrill* (4), and, with regard to that case, it is admitted by Mr. Warmington that it is an authority completely in point, and it is an authority which was undoubtedly affirmed in terms by Lindley L.J. in *Wheaton v. Maple & Co.* (3), in the presence of Lopes and A. L. Smith L.JJ., who do not take any exception to Lindley L.J.'s judgment in that case. Under these circumstances I think that this appeal fails, on the ground that we are bound by authority to hold that, even where adjoining lands are occupied by lessees under a common landlord, a right

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(1) 11 C. B. (N.S.) 449.

(2) *Ibid.*, 454.

(3) [1893] 3 Ch. 48.

(4) 37 Ch. D. 56.

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to light absolute and indefeasible may be acquired in respect of one land as dominant tenement over the other land as servient tenement, and that the right so acquired enures not only as between the two lessees, but as against the reversioner and any person who may succeed him in favour of the lessee of the dominant tenement and his successors as a right appurtenant to the land. That being the effect of the authorities, I come to the conclusion that those authorities have not been overruled by the case of *Colls v. Home and Colonial Stores, Ltd.* (1), in the House of Lords.

I merely wish to add this for myself, that if Lindley L.J. meant to say that the authorities to which I have been alluding, beginning with *Frewen v. Philipps* (2) and ending with *Robson v. Edwards* (3), are entirely consistent with the judgment of Parke B. in *Bright v. Walker* (4), I respectfully cannot agree with him. I think that if one looks at the passage in the judgment of Parke B. beginning with the words "In order to establish a right of way" (5), it is very difficult to reconcile that with the view taken in *Frewen v. Philipps* (2) and *Mitchell v. Cantrill* (6) and *Robson v. Edwards* (3), and the other cases referred to by Lindley L.J.; but I do not know that I am justified in making this observation, because, whatever my own view may be, the Court of Exchequer Chamber at the time when *Frewen v. Philipps* (2), was decided was constituted by judges of the highest eminence, and they had *Bright v. Walker* (4) cited to them. At the same time I cannot help saying that I think it very difficult to reconcile the two cases, and if I had had myself to decide which of the two was right, I should have been disposed to say that *Frewen v. Philipps* (2) was right, and that *Bright v. Walker* (4) was wrong, because it took a very narrow view of the meaning of the statute when it decided that because prior to the passing of the Act an easement, including the right to light, could not have been acquired merely by reason of the enjoyment of the right for a limited time by one of two lessees against the other, that was sufficient to justify the Court in excluding from

(1) [1904] A. C. 179.

(2) 11 C. B. (N.S.) 449.

(3) [1893] 2 Ch. 146.

(4) 1 C. M. & R. 211.

(5) *Ibid.*, 219.

(6) 37 Ch. D. 56.

the operation of the plain words of s. 3—and the words are perfectly plain—the case of the right to light. That, however, is not material for me to decide here, and for the reasons I have given I think that this appeal ought to be dismissed, and dismissed with costs.

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ROMER L.J. The defendant by this appeal raises a clear point of law. He contends that where there are two houses adjacent, occupied by two different lessees, although the lessee of one may, following the words of s. 3 of the Prescription Act, have enjoyed the access and use of light to and for his house for the full period of twenty years without interruption as against the other house, yet he cannot, under the section, acquire the right to light as against that other house where the two lessees occupy under the same landlord. He says, rightly, you cannot acquire a right to light, under the Prescription Act, for a term of years only; you must acquire it absolutely or not at all. For that he refers to *Wheaton v. Maple & Co.* (1), which is binding upon us, and he says, therefore, in the case I have given, the lessee could not have acquired, as against the servient tenement, a right to light, seeing that he could not have acquired it as against his own landlord. The question is whether or not that is a good point to be taken in this appeal. Now it might well be a very arguable point indeed had it not been decided, as it has been, adversely to the appellant several years ago. It was decided adversely to that contention in the Exchequer Chamber in the year 1862 by *Frewen v. Philipps*. (2) It was decided in the same way by this Court in 1887 in *Mitchell v. Cantrill*. (3) It was pointed out in these two cases that the right to light under s. 3 differs from other easements under other sections of the Prescription Act owing to the peculiar wording of s. 3, and that under s. 3 it is not necessary, as it was before the Act, to allege that the access and use of light had been actually enjoyed as of right, thus distinguishing the right to light from other easements. Now those two cases have stood all these years. There is no case decided the other way. We are therefore bound to follow those

(1) [1893] 3 Ch. 48.

(2) 11 C. B. (N.S.) 449.

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two decisions, it appears to me, unless we can find that, either expressly or by necessary implication, they have been overruled or dissented from by a decision of a superior Court so as to make that decision binding upon us. Of course, if there had been a subsequent decision binding on us which was inconsistent in principle with *Frewen v. Philipps* (1) and *Mitchell v. Cantrill* (2), then it might properly be said that a decision inconsistent in principle by implication overrules those authorities. The only two cases referred to on behalf of the appellant as being inconsistent with those authorities are *Wheaton v. Maple & Co.* (3) and *Colls v. Home and Colonial Stores, Ltd.* (4). Let me just refer to *Wheaton v. Maple & Co.* (3). In that case the circumstances were these: The servient tenement belonged to the Crown, who had leased it; twenty years' access and use of light had no doubt been enjoyed by the owner of the dominant tenement, but the Court held, first, that s. 3 of the Prescription Act did not bind the Crown; secondly, that a right under s. 3 cannot be acquired for a term only—it must be acquired absolutely or not at all—and that, inasmuch as the right could not be acquired against the Crown and must be acquired absolutely or not at all, it could not be acquired as against the lessee. That is all that that case decided. It was in no wise inconsistent, in my view, with the decisions in *Frewen v. Philipps* (1) and *Mitchell v. Cantrill* (2), and, indeed, Lindley L.J., who was a party to the decision, said, referring to *Frewen v. Philipps* (1): “In that case the plaintiff had acquired the easement he claimed, not only against the defendant, the adjoining tenant, but also against his lessor, although the plaintiff and the defendant both held under the same landlord.” That case, therefore, was not inconsistent with *Frewen v. Philipps* (1), and Lindley L.J. referred to *Frewen v. Philipps* (1) without disapproval. Then, as to *Colls v. Home and Colonial Stores, Ltd.* (4), all that that case decided, so far as relevant to the present appeal, is this, that the right to light when acquired under the Prescription Act was still the same kind of right as that known under the old law. It did not decide that the right could not be

(1) 11 C. B. (N.S.) 449.

(2) 37 Ch. D. 56.

(3) [1893] 3 Ch. 48, 65.

(4) [1904] A. C. 179.

acquired under the Act in circumstances in which or as against persons as against whom it could not have been acquired prior to the Act. *Frewen v. Philipps* (1) was present to the minds of the learned Lords who decided that case, and it is sufficient to call attention, as my Lord has done, to the passage in Lord Lindley's speech in which he refers to *Frewen v. Philipps* (1) as being in no wise inconsistent with the decision arrived at by their Lordships in that case. That being so, it follows that there is no authority which would justify us in disregarding the decisions in *Frewen v. Philipps* (1) and *Mitchell v. Cantrill* (2), which accordingly govern this case and necessitate our deciding against the point of law taken by the appellant.

On the special facts of this case I need only say that the defendant has not shewn that the plaintiffs are in a worse position than they would have been if the circumstances connected with the surrender and renewal of Watkins' lease on which the defendant relies had not existed. I do not think it necessary to go into those circumstances in detail, except by saying that they do not, to my mind, take away the right which the plaintiffs would have had if those circumstances had not occurred and their tenancy had been a continuation under the old lease. That being so, the appeal appears to me wholly to fail, and should be dismissed.

FLETCHER MOULTON L.J. Before the year 1900 John Watkins, jun., as occupier of No. 16, North Parade, had enjoyed with regard to the windows in question in this case an uninterrupted access of light over the back buildings of the neighbouring house, No. 18, for a period of over twenty years, and had therefore qualified for the right which is granted by the 3rd section of the Prescription Act. At that time No. 18 was in the hands of a tenant under the same reversioner as No. 16, i.e., the corporation of Aberystwith. The first thing we have to consider is what was the legal result of this position of the two parties. I am not going to refer to the cases, because they have been so thoroughly dealt with by my learned brethren, but shall content myself

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with saying that it has been decided by this Court and by the Exchequer Chamber that in those circumstances the right to light is acquired in spite of the fact that the dominant and the servient tenements are both held under leases from the same reversioner. I quite agree with all the remarks that have been made by my brethren as to those cases not having been affected by any subsequent decisions. Therefore in the year 1900 these two windows had acquired what for shortness I may call the status of ancient lights. In 1900 John Watkins, jun., surrendered the lease of No. 16 and took a fresh lease from the corporation. The moment he surrendered the lease, (which caused the property to come into the hands of the corporation,) they might have destroyed the status of those windows as ancient lights by simply letting the tenement to the next tenant with notice that they were not ancient lights. Did they do so? Here we pass entirely from the question of law to a question of fact. Looking at the lease that was granted, Aye or No, did the incoming tenant take the premises with those windows possessing the status of ancient lights or not? Neither party relies on any particular words in the lease, and the appellant does not contest that, if the new lease had been granted to a stranger unacquainted with the place, the house that would have passed to him under the lease would be a house possessing these two windows as ancient lights, i.e., entitled to the access of light over the back premises of No. 18. But it is suggested that John Watkins, jun., was so much mixed up with the transactions of the corporation in connection with this property that he must be taken to have understood that the status of ancient lights was intended to be abolished by the corporation in granting this new lease. Now it is clear that the onus of shewing this rests on the appellant, because it must be shewn that John Watkins, jun., was so far from being a mere stranger to the matter that he is not entitled to rights which ex concessis would have passed to a stranger. The evidence in support of that contention is, in my opinion, extremely flimsy, and I think the learned judge was quite right in coming to the conclusion that the rights of John Watkins, jun., in taking this lease were no other than they would have been if he had been entirely a stranger to the place

In these circumstances he took a house in which these two back windows had the status of ancient lights, and this appeal must fail.

Solicitors: *Watkins & Pulleyn, for Hugh Hughes, Aberystwith*;
Philpot & Morrell, for A. J. Hughes, Aberystwith.

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Partnership—Dissolution—Death of Partner—Business carried on by Surviving Partner—Authority to mortgage Partnership Assets—Mortgage by Deposit of Title Deeds of Partnership Real Estate—Lien of Deceased Partner's Executors—Priorities—Notice—Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 39.

A surviving partner, for the purpose of winding up the partnership affairs, may continue the business and may mortgage the partnership property, whether real or personal, to secure a partnership debt.

The principle of *In re Langmead's Trusts*, (1855) 20 Beav. 20; affirmed on appeal, 7 D. M. & G.*353, applied to real estate.

A surviving partner carried on the business in the partnership name and continued the partnership banking account, which was overdrawn at the death of the deceased partner, and remained overdrawn until the final winding-up of the business. After paying certain moneys into this account and drawing certain moneys out, he deposited with the bank the title deeds of certain partnership real estate to secure the overdraft:—

Held that, in the absence of evidence to the contrary, the bank were entitled to assume that the dealings with the account were for the purpose of winding up the partnership, and that their mortgage was a valid security, and took priority over the lien of the deceased partner's executors on the surplus assets for his share in the partnership.

Decision of Farwell J., [1906] 1 Ch. 113, affirmed.

APPEAL from a decision of Farwell J. (1)

For the purposes of the appeal the facts may be thus summarized:—

From 1873 to 1894 W. T. Bourne and G. Grove carried on business in co-partnership, in the name of Bourne & Grove, under articles of partnership which provided that on the death

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of either partner during the partnership his executors or administrators should be entitled to the capital belonging to the deceased partner with 5 per cent. interest. In July, 1894, the partnership term expired, and thereafter the partners continued to carry on business in co-partnership on the terms of the articles so far as they were applicable to a partnership at will until the death of Grove on May 9, 1901. After Grove's death Bourne carried on the business in the partnership name until his death on September 3, 1902. By an order made in an action to administer Bourne's estate, which was insolvent, it was ordered that Grove's executors should be at liberty to prove for 3000*l.*, as representing his interest in the partnership assets, and their costs against Bourne's estate, and were to have a lien for the amount of such debt and costs on the assets of the partnership or the proceeds of sale thereof.

Messrs. Berwick & Co. were the bankers of the firm, and at Grove's death the partnership account at the bank was overdrawn to the amount of 6476*l.* odd. After Grove's death Bourne continued the account at the bank in the firm's name, for the exclusive purposes of the business carried on by him. On February 7, 1902, Bourne deposited with the bank the title deeds of certain real estate forming part of the partnership property, and signed a memorandum of deposit to secure the overdraft, which then stood at 5088*l.* odd. Between the date of Grove's death and the date of the memorandum of deposit Bourne had paid into the bank to the credit of the account 10,073*l.* odd, and had drawn out 8685*l.* odd. After the memorandum of deposit further sums were paid in and drawn out, and at Bourne's death the overdraft stood at 4463*l.* odd. After Bourne's death the business was sold by order of the Court, and the property which was the subject of the equitable mortgage was represented by a sum of 5300*l.* The question was whether the bank or Grove's executors were entitled to priority.

Farwell J. held that the bank took priority.

Grove's executors appealed.

Eve, K.C., and *P. Wheeler*, for the appellants. It is submitted that a surviving partner has no power to sell or mortgage real

estate forming part of the partnership property—(1.) for the purpose of the business, (2.) to secure his own debt; and that, therefore, the lien of the appellants for the 3000*l.* takes priority over the equitable mortgage of the bank. The lien of the representatives of a deceased partner for his interest in the partnership attaches to the whole of the partnership property in whatever form it may be found, and it is recognized by the Partnership Act, 1890, s. 39: see Lindley on Partnership, 7th ed. pp. 387, 388.

Farwell J. has applied the principle of *In re Langmead's Trusts* (1) to real estate. That is contrary to *In re Ryan* (2), which is exactly this case.

[VAUGHAN WILLIAMS L.J. referred to Lindley on Partnership, 7th ed. p. 379 (note *q*), as to *In re Ryan*. (2)]

ROMER L.J. The question whether a surviving partner, by virtue of his position, could sell or mortgage the partnership property does not seem to have been raised or decided in that case.]

For the purposes of that question there is a material distinction between real and personal estate arising from the differences in the mode of transfer.

[ROMER L.J. Where land is partnership property it is converted into personalty: see Lindley on Partnership, 7th ed. p. 381, and the Partnership Act, 1890, s. 22.]

That goes a long way from saying that land may be sold or mortgaged without regard to the rights of the personal representatives of the deceased partner. It is no hardship for the purchaser or mortgagee to inquire of such representatives whether they make any claim, and the bank ought to have that simple precaution in this case. In *In re Clough* (3) an equitable mortgage by a surviving partner for a partnership debt was held valid; but here, by the application of the rule in *Clayton's Case* (4), the overdraft existing at Grove's death was paid off before the date of the equitable mortgage, and therefore the mortgage was given to secure Bourne's private debt, and the bank had notice of this. There is no evidence that this business was being carried on simply for the purpose of winding up the partnership, and, that

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(1) 20 Beav. 20; on appeal, 7 D. M. & G. 353.

(2) (1868) Ir. R. 3 Eq. 222.

(3) (1885) 31 Ch. D. 324.

(4) (1816) 1 Mer. 572.

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1906 interest in the continuing business.

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[VAUGHAN WILLIAMS L.J. In Lindley on Partnership, 7th ed., p. 166, it is suggested that an equitable mortgage by one partner by a deposit of deeds relating to partnership real estate "ought to be held valid in all cases in which it is made by a partner having an implied power to borrow on the credit of the firm."]

That passage has no application to the case of one partner dying and the surviving partner carrying on the business. *In re Langmead's Trusts* (1) is treated in Lindley on Partnership, 7th ed., p. 390, as confined to a bona fide purchaser of specific chattels.

Butcher, K.C., and *Martelli*, for the bank.

Stamp, for creditors having the conduct of the action.

VAUGHAN WILLIAMS L.J. This case turns upon a very narrow point. It is conceded by both the appellants' counsel that when there is a partnership between two partners and one of those two partners dies, unless there is something in the partnership articles to the contrary, prima facie the surviving partner has not only the right, but the duty, to realize the partnership property, and for the purpose of that realization to carry on the business if it is necessary so to do. That is not disputed, but it is said that, although that is perfectly true with regard to so much of the partnership assets as constitute personal property, it is not true in respect of real property. Now I say in the first instance that no case has been produced to us which decides anything of the sort; no case has been produced to us which excludes from this power of the surviving partner the right to realize and deal with partnership realty for the purpose of paying partnership liabilities. In the next place, I say that, so far as the principle is concerned, it is obvious that the principle is wide enough to cover both personalty and realty. The real truth of the matter is that, leaving out all questions of legal estate, there is, as between the surviving partner and the representatives of the deceased partner, an overriding duty to wind up the partnership assets and to do such acts as are necessary for that purpose, and if it is necessary for that winding up either to continue the

(1) 20 Beav. 20; on appeal, 7 D. M. & G. 353.

business or borrow money or to sell assets, whether those assets are real or personal, the right and the duty are co-extensive. I will go one step further. It really appears from the case of *In re Clough* (1), to which Mr. Wheeler called our attention, that it is not denied, and cannot be in the face of the authorities, that, given a debt which was in existence before the dissolution by death, there is the right to sell or to pledge the realty. It is not merely suggested here that the rule does not apply to realty; but it is said that that is a limited rule, and that the surviving partner, although he has the right to raise money on the mortgage of the realty, can only do it for the purpose of particular debts. I say again that I cannot find any authority for that proposition, and it seems to me that when Lord Lindley in his book on Partnership passes on to deal with the proposition stated on p. 166, which Mr. Wheeler said was only as between living partners in an existing partnership, it is quite plain upon p. 248 that he applies the same proposition to the case where there has been a dissolution of partnership. Under these circumstances I think that this part of the argument fails. Then there is another part of the argument which belongs exclusively to Mr. Eve. He says that by the application of the principles which are the basis of the rule in *Clayton's Case* (2) this debt must be taken to have been paid, and therefore the bankers cannot rely upon this mortgage, because they ought to have known that, that debt having been paid, the surviving partner had no right to pledge or mortgage the real estate. All I can say with reference to that is that as far as the bankers are concerned this apparently was an ordinary winding up; there were payments in and payments out, and both the payments in and the payments out must be taken to have been made on account of this realization and winding up. Under these circumstances it seems to me that point also fails. I think, therefore, that the appeal fails, and must be dismissed with costs.

ROMER L.J. I am of the same opinion. When a partner dies and the partnership comes to an end, it is not only the right, but the duty, of the surviving partner to realize the assets for the

(1) 31 Ch. D. 324.

(2) 1 Mer. 572.

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purpose of winding up the partnership affairs, including the payment of the partnership debts. It is true that in a general sense the executors or administrators of the deceased partner may be said to have a lien upon the partnership assets in respect of his interest in the partnership on taking the partnership account, but that lien is not one which affects each particular piece of property belonging to the partnership so as to affect that property in the hands of any person dealing with the surviving partner in good faith. It is really what one may call a general lien upon the surplus assets, and does not affect each particular property so as to interfere with the right of the surviving partner to deal with the separate properties belonging to the partnership for the purpose of realization and to give a good title to persons dealing in good faith with him in respect of those properties. The power of the surviving partner of course extends to a sale, and it also extends to giving a mortgage on any particular part of the property belonging to the partnership to secure in good faith one of the partnership debts. That being the general rule, it has been argued on this appeal that for that purpose there is a distinction to be drawn between real estate and chattels. I do not know whether the argument is intended to draw a distinction between real estate and chattels real or between chattels personal and choses in action, but I rather gather that it is intended to say that, so far as concerns real estate, and possibly chattels real, a distinction is to be drawn between them and chattels personal and choses in action. To my mind, when you consider the reasons for the rule that the lien of the deceased partner or his representatives does not impede the powers of the surviving partner, those reasons apply equally well to real estate as to leases as to choses in action and as to chattels personal; in fact, it applies to any personal property which forms part of the partnership assets, as, for example, to a patent or a share in a patent; and no good reason can be suggested, or has been suggested to my mind, why any distinction should be drawn. It is to be borne in mind that the real interest of the partnership in real estate is of a personal character, because wherever the legal estate may be, whether it is in the partners jointly or in one partner or in a stranger it does not matter, the beneficial interest in the real estate belongs

to the partnership, with an implied trust for sale for the purpose of realizing the assets and for the purpose of giving to the two partners their interests when the partnership is wound up and an account taken. So that no real distinction can be drawn, it appears to me, between real estate held for partnership purposes and personal estate. There is no more difficulty in dealing with the one than there is in dealing with the other, or any reason why you should give a power to the surviving partner to deal with personal estate and not with real estate. As I have pointed out, the fact that the property is real estate has nothing to do with it. In the eyes of equity the real estate, for the purposes of the partnership, is mere personalty just as much as a chattel real. That being so, it appears to me that the chief argument of the appellants here that a distinction ought to be drawn in their favour because the property here charged was real estate entirely fails. Then the only question remaining is this, Was the debt of the bank which the surviving partner gave the charge to secure one that really to the knowledge of the bank was not a partnership debt? To my mind, on the contrary, the bank were entitled to consider it and treat it as a partnership debt. The account with them was a partnership account. It was continued under the partnership name, and apparently for the purposes of the partnership, and it appears to me impossible to say that it is not or may not be reasonable for a surviving partner to continue the partnership account for the purpose of winding up the estate. To my mind the case is very much as if the only change in the account had been to put the account of the partnership in administration. When you find an account of that kind continued—and here it is only continued for something like nine months before the charge is given—the bankers, it appears to me, are entitled, in the absence of evidence shewing the contrary, to assume and to be credited with the belief that the surviving partner is continuing it for the purpose of realization, and that sums paid into that account and sums drawn out of that account in the name of the partnership are paid in and drawn out for the purpose of the partnership. That being so, in this case when the account is finally taken and there is a balance due to the bankers, that, to my mind, is a balance which the bankers are entitled to

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believe and to assert was, so far as they were concerned, a partnership debt in respect of which they were entitled to have the security given which this surviving partner gave. It appears to me that under these circumstances from any point of view the charge given was one which it was within the powers of the surviving partner to give, and that accordingly the bankers have a right in respect of that charge which is superior to any claim by the executors of the deceased partner in respect of their lien.

FLETCHER MOULTON L.J. I am of the same opinion. It appears to me that the powers and duties of a surviving partner with regard to the realization of the partnership estate spring from the very nature of the partnership and the relationship to the world outside, and are quite independent of the nature of any particular property which may be owned by the partnership. I cannot help thinking that a great deal of confusion in this case has arisen from the phrase that the deceased partner has a lien on the surplus assets of the firm. I doubt whether "lien" is the word which best describes his right. It is not a lien on any specific property existing at the date of the death such as would fetter its realization or conversion into money, but the right is really a claim against the surplus assets after realization, whether those surplus assets consist entirely of the proceeds of realization or whether they include some specific property which existed at the date of the death. As soon as you get your surplus the lien attaches. Until you get your surplus there is no claim or lien which in any way affects the power and duty of the surviving partner to realize the property of the partnership, and to discharge its liabilities.

Solicitors: *Badham & Comins, for Brookes & Badham, Pershore; Maples, Téeddale & Co., for Lord & Parker, Worcester; P. W. Chandler.*

H. B. H.

In re ENGLISH AND COLONIAL PRODUCE COMPANY,
LIMITED.

[00189 of 1902.]

Company—Costs—Taxation—Preliminary Expenses—Preparation of Memorandum and Articles of Association—Registration Fees—Liability of Company.

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BUCKLEY
J.
May 30.
C. A.
June 28.

A solicitor, on the instructions of persons who afterwards joined the board of a company then about to be formed, prepared the memorandum and articles of association of the company and paid the fees for its registration :—

Held by Buckley J. and the Court of Appeal, that he was not entitled to recover from the company the costs of the preparation of the memorandum and articles of association ; but

Held by Buckley J. (there being no appeal upon this point) that, inasmuch as the company was under a statutory liability to pay the registration fees, he was entitled to recover those fees from the company.

Per Vaughan Williams and Romer L.JJ. : The fact that a company adopts and takes the benefit of services rendered under a contract entered into before its formation does not make the company liable in equity to pay for those services.

Dictum of the Court of Appeal in *In re Hereford and South Wales Waggon and Engineering Co.*, (1876) 2 Ch. D. 621, 624, dissented from.

THIS was a summons taken out in the winding-up of the English and Colonial Produce Company, Limited (below called the Produce Company), by Messrs. Dyson, Smith & Marchant, solicitors, to review the taxation of a bill of costs delivered by them to that company.

A company named “The English and Colonial Forage Company, Limited” (below called the Forage Company), passed special resolutions for winding-up voluntarily and authorizing its liquidator to enter into an agreement with a new company (the Produce Company) for the sale of its assets on certain terms, one of which was that the Produce Company should take over the liabilities of the Forage Company.

The solicitors alleged that the Forage Company, before going into liquidation, instructed them to do what was necessary to form the Produce Company.

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On November 2, 1901, according to a minute in a book of the Produce Company, a meeting of the following persons was held, namely, Messrs. Church, Sutton, Meyer, Porritt, and Sternberg, at which the memorandum and articles of association were read, and it was resolved that the solicitors of the company be instructed to forthwith register the company.

These five persons did in fact on November 2, 1901, sign the memorandum and articles of the Produce Company, and a member of the firm of solicitors attested their signatures.

On November 9, 1901, the solicitors registered the company, and paid to the Registrar of Joint Stock Companies the registration fees, amounting to 33*l.* 2*s.* 6*d.* The company was formed to acquire the undertaking of the Forage Company, and also the business of Messrs. Meyer & Porritt.

Clause 109 of the articles of association of the Produce Company provided as follows: "The business of the company shall be managed by the directors, who may pay all such expenses of and preliminary and incidental to the promotion, formation, establishment and registration of the company as they think fit."

In July, 1902, an order was made for the winding-up of the Produce Company, and, in accordance with the directions of Kekewich J. in an action by the company against the solicitors, the solicitors lodged certain bills of costs in the winding-up proceedings. The bill of costs now in question was taxed by Mr. Registrar Hood, who disallowed the following items, amounting to 216*l.* 14*s.* 6*d.*

"1901. Many attendances upon Mr. Church, Mr.

Nov. Sutton, Mr. Porritt and Mr. Meyer as to forming a new company to take over the business of the Forage Company and of Messrs. Meyer & Porritt.

Instruction for memorandum and articles of association for incorporation.

Drawing same.

Fair copy.

Attending counsel with papers to settle memorandum and articles.

Fair copy memorandum and articles.			
Attending instructing printer and examining and approving same and paid printer's fees, attesting signatories, signatures, and preparing all necessary documents to comply with the requirements of the corporation; and attending to register company, and doing all things necessary to enable the company to commence business	160	0	0
Paid fees and registering company	33	12	6
Paid Mr. Israel's fees and settling memorandum and articles of association	16	10	0
Drawing and approving form of certificate and instructing printer to print same	2	2	0
Paid printer's charges	4	10	0
	<u>216</u>	<u>14</u>	<u>6</u> "

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The solicitors in their objection to the taxation said that the Forage Company originally instructed them to do what was requisite to form the Produce Company which was to acquire its assets, and they relied on the minute of November 2, 1901, as shewing that the persons who subsequently became directors confirmed the instructions of the Forage Company. They also relied on the agreement of the Produce Company to pay the debts of the Forage Company, and on clause 109 of the articles of association of the Produce Company.

The registrar disallowed the objection on the following grounds: "The costs in question appear to have been authorized by certain persons who afterwards joined the board of the company; but though the company had power to pay, they never took any steps to pass any resolution to that effect. The company are therefore not liable to pay the costs of the registration of the company."

The solicitors thereupon took out a summons to review the taxation in respect of the disallowance of the items amounting to 216*l.* 14*s.* 6*d.*

C. A. The summons was heard before Buckley J. on May 30,
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Gore-Browne, K.C., and R. J. Drake, for the solicitors.

A. W. Groser, for the liquidator.

BUCKLEY J. I have to review the taxation by the registrar in companies winding-up of a bill of costs in respect of certain items, amounting in the aggregate to 216*l.* 14*s.* 6*d.*, which have been disallowed by him. I will deal first with two items of 160*l.* and 16*l.* 10*s.*, which are, shortly stated, for work relating to the formation of a company and to the preparation of its memorandum and articles of association. As appears by the bill, there were attendances on Messrs. Church, Sutton, Porritt, and Meyer as to forming a new company to take over the business of the Forage Company and of Messrs. Meyer & Porritt, and instructions were given for the memorandum and articles for the incorporation of the new company. The persons giving those instructions were *prima facie* the persons I have named. The solicitors in their objections state that the Forage Company prior to going into voluntary liquidation originally instructed the solicitors to do what was requisite to form the Produce Company to acquire the assets, and that in pursuance of such instructions they did all things necessary before the resolution for the voluntary winding-up of the Forage Company was passed. The first entry in the minute-book of the Produce Company is the minute of a meeting on November 2, 1901, of the four persons mentioned in the bill and a Mr. Sternberg, and at that meeting the memorandum and articles of association were read and signed, and it was resolved "that the solicitors of the company be instructed to forthwith register the company." The Produce Company was incorporated on November 9, 1901, and its memorandum and articles were then filed with the Registrar of Joint Stock Companies. Therefore the liability for the work done by the solicitors had already been incurred before the incorporation of the Produce Company. Under these circumstances the question arises who retained the solicitors, and did the solicitors do the work intending to look for payment to

the Produce Company, when incorporated, or to the gentlemen I have mentioned? The registrar finds as a fact, and in my judgment rightly, that these gentlemen retained the solicitors. The Produce Company, after it was incorporated, took the benefit of the work done by the solicitors. Is the company rendered liable by that fact to pay for the work done? The doctrine which is applicable is to be found in the judgment of Fry L.J. in *In re Rotherham Alum and Chemical Co.* (1) The Lord Justice says: "The appellant rests his case on two grounds. One is that where a person takes property on which labour has been expended and gets the benefit of that labour he must pay for it. As pointed out by Lord Justice Lindley, that is by no means universally true. It is not true where the work was done for the vendor of the property, and that was the case here, these costs having been incurred on the retainer of Mycock." That statement, *mutatis mutandis*, applies here. I hold that the case is governed by *In re Rotherham Alum and Chemical Co.* (1), and that the company was not liable for the costs incurred in respect of its promotion.

The fee of 33*l.* 12*s.* 6*d.* paid by the solicitors to the Registrar of Joint Stock Companies on registering the company stands upon a different footing. By s. 17 of the Companies Act, 1862, the memorandum and articles are to be delivered to the Registrar of Joint Stock Companies, and "there shall be paid to the registrar by a company having a capital divided into shares"—and the Produce Company was such a company—certain fees. Under that section and a subsequent Act of Parliament the company became liable to pay the fees on its registration amounting to 33*l.* 12*s.* 6*d.* The solicitors paid that sum, which the company was under a statutory liability to pay to the revenue authorities, and the solicitors were in my judgment entitled to charge the company in respect of this item. As to the other claims which the registrar has disallowed, it was for the solicitors to make out that they were entitled to make the charges, and they have failed to do so. In respect of the first item, the charge of 160*l.*, the solicitors have craved in aid clause 109 of the articles of association. But that clause is

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(1) (1883) 25 Ch. D. 103, 111.

C. A. really inconsistent with the suggestion that the company was
 1906 liable for all the expenses of the formation, establishment, and
 ENGLISH AND registration of the company. The result is that the certificate
 COLONIAL of the registrar is varied to this extent, that the fee of 33*l.* 12*s.* 6*d.*
 PRODUCE is allowed, and that his decision as to the other items is affirmed,
 COMPANY, and I make no order as to the costs.
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F. E.

C. A. The solicitors appealed, and asked that the whole of the
 21*l.* 14*s.* 6*d.* should be allowed. The appeal was heard on
 June 28, 1906.

Gore-Browne, K.C., and *R. J. Drake*, for the solicitors.
 Although a company is not liable at law for professional services
 rendered before its formation, yet, if it has adopted and taken
 the benefit of those services, it is liable in equity to pay for
 them: *In re Hereford and South Wales Waggon and Engineering*
Co. (1) In *In re Empress Engineering Co.* (2) the point was left
 open, but James L.J. there says it is inequitable for a man not
 to pay for the services of which he has taken the benefit.

[ROMER L.J. There is no decision in your favour in either of
 those cases. The whole argument is founded on what appears
 to be an oversight in the *Hereford Co.'s Case*. (1) Lindley L.J.
 puts the matter clearly in *In re Rotherham Alum and Chemical*
Co. (3) A solicitor must act on the instructions of some client,
 and if the promoter instructs him he must pay. I know of no
 such equity as is here claimed.]

In re Hereford and South Wales Waggon and Engineering Co. (1)
 is cited in the text-books as an authority for this equity.

Stewart-Smith, K.C., and *A. W. Groser*, for the liquidator.

THE COURT, being of opinion that the solicitors had been
 instructed by Messrs. Church, Sutton, Porritt and Meyer, held
 that the company was not liable for the items in dispute; but,
 it appearing that the company had already paid the solicitors 100*l.*
 for work done in connection with its formation, they held that

(1) 2 Ch. D. 621, 624.

(2) (1880) 16 Ch. D. 125.

(3) 25 Ch. D. 103, 110.

the solicitors were entitled to appropriate that payment to those items, and referred the taxation back to the registrar to review on this footing; and they made no order as to the costs of the appeal.

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VAUGHAN WILLIAMS L.J. I wish to say one word about the proposition which was put forward by Mr. Gore-Browne, and for which he cited a passage from the judgment of Mellish L.J. in *In re Hereford and South Wales Waggon and Engineering Co.* (1) Mellish L.J. was there delivering the judgment of the Court of Appeal, consisting of himself, James L.J., and Baggallay, J.A. It is said that that case is an authority for the proposition that if expenses are incurred before the formation of a company which afterwards comes into existence, and the company takes the benefit of the work in respect of which those expenses arose, although the company could not be sued at law for those expenses, inasmuch as it was not in existence at the time when the expenses were incurred, and was therefore unable to authorize agents to act for it and ratification was impossible, yet it was under some liability in equity.

That passage is as follows: "We think, however, that if the company can properly be considered to have adopted and derived benefit from these services, they would in equity be bound to pay for them." Those words do look as if they would cover the proposition that the adoption and taking the benefit of the services by the new company would make the company liable in equity before it came into existence. I do not, however, think that that is the right way to look at the judgment. It was a case in which, even supposing there was authority for asserting that proposition, there was, by reason of the fraudulent concealment of the claimants, a complete answer to the claim based on that liability. I think that all the Court did in that case was not to decide that there was such liability in equity, there being no liability in law, but merely to say that even on that assumption there was no liability under the circumstances of that case. Still I recognize that that case has been cited several times since as an authority for the proposition I have mentioned. It cannot

(1) 2 Ch. D. 621, 624.

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be said, however, that that proposition has ever been affirmed in the subsequent cases on this subject. The dictum has been explained and not applied in the subsequent cases, and the explanation in each case was a different one. If the cases of *In re Empress Engineering Co.* (1) and *In re Rotherham Alum and Chemical Co.* (2) are looked at, it will be seen that, though the argument which has been addressed to us here was advanced in each of those cases, it was not adopted by the Court. In these circumstances I think we were all prepared to hold that there is no binding authority for the proposition that a company, because it has taken the benefit of work done under a contract entered into before the formation of the company, can be made liable in equity under that contract. On the contrary, it seems to me that the authorities are the other way. Perhaps it is sufficient for me to say this, because on the facts of the present case we have not to decide the question of the judgment in *In re Hereford and South Wales Waggon and Engineering Co.* (3) But it was so pressed upon us that this case was cited in the text-books as an authority for the proposition in question that I thought it right to say, although it is merely an obiter expression of opinion, that I do not myself think that case is any authority for that proposition.

ROMER L.J. I also think it right to state my views on this point. In my opinion, with respect to a solicitor's claim for costs for work done by him in relation to the formation of a company which is subsequently formed, in order to substantiate a claim against the new company for his costs as solicitor he must establish a legal claim against the company either on his own behalf or on behalf of some person or persons in whose shoes he is entitled to stand. If he cannot do that he cannot succeed, in my opinion, in establishing a claim on what are called equitable grounds. The idea that a company merely because it has obtained the advantage of the solicitor's work done before the formation of the company is liable in equity for the costs of that work appears to me to be wholly untenable. In my

(1) 16 Ch. D. 125.

(2) 25 Ch. D. 103.

(3) 2 Ch. D. 621, 624.

opinion there is no such equity, and any claim based upon it ought to fail.

FLETCHER MOULTON L.J. My decision is based on the special facts of this case and I do not consider that any point of law is involved. I wish however to say that I reserve my decision as to the liability of a company in respect of the necessary costs of the legal steps in the course of its formation, although I quite agree that there is no binding decision that the company is liable to pay such costs. I also agree with my brothers in thinking that there is no general equitable principle that because you have got the benefit of a man's work therefore you are liable to pay for it. Stated so broadly, that proposition is, in my opinion, absolutely incapable of being supported.

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Solicitors: *Dyson, Smith & Marchant; S. J. R. Stammers.*

H B H.

BADISCHE ANILIN UND SODA FABRIK v. ISLER.

[1905 B 964.]

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July 17, 18.

Patent—Infringement—Licence—Condition—Purchase of patented Article from Licensee without Notice of Condition—Estoppel—Purchaser's Liability to Action for Infringement.

Appeal from a decision of Buckley J. (reported [1906] 1 Ch. 605) dismissed.

THIS was an action for infringement of a patent, and the plaintiffs alleged that the defendant had bought their patented dye from their licensees with knowledge that the licence was restricted; that the licensees were bound to sell to consumers only, and not to dealers; and that the defendant was a dealer, and had sold the dye to other persons.

Buckley J., after discussing the law on the subject, held that the licence in question was an implied licence to sell the dye subject only to conditions mentioned in a label attached to the tins in which the dye was sold. Those conditions implied that

C. A. purchasers of unopened tins might resell the dye ; and, inasmuch
 1906 as the defendant had bought the dye only in that way, he had
 BADISCHE not infringed. His Lordship therefore dismissed the action.
 ANILIN UND The plaintiffs appealed.
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Cripps, K.C., and J. C. Graham, for the appellants.
Astbury, K.C., and A. Colefax, for the respondent.

THE COURT (Vaughan Williams, Romer and Cozens-Hardy L.JJ.) said that the only restriction on the sale of the dye which had been proved was that contained in the labels attached to the tins in which it was sold. It was therefore unnecessary to dispose of any of the other questions which had been raised. Buckley J. had come to a right conclusion on the evidence, and the appeal must be dismissed.

Solicitors : *J. H. & J. Y. Johnson ; Pritchard, Englefield & Co., for Boote, Edgar & Co., Manchester.*

H. C. R.

C. A. PONSFORD, BAKER & CO. v. UNION OF LONDON AND
 1906 SMITH'S BANK, LIMITED.
July 13, 16 ;
Aug. 9.

[1906 P. 1856.]

Bankruptcy—Default on Stock Exchange—Mortgage—Deposit of Securities—Redemption—Tender of Amount due on Mortgage—Secured Creditor—Notice of act of Bankruptcy—Costs—Title of Trustee in Bankruptcy—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 9, sub-s. 2; ss. 43, 49.

A secured creditor is not entitled to receive payment of his debt from his debtor and to hand over the securities after notice of an act of bankruptcy on the part of the debtor; this is not a limitation of the secured creditor's rights and powers to deal with his securities in any way in which he is entitled to deal with them by virtue of his contract with the debtor, but is only the consequence of the debtor having incapacitated himself from tendering the money.

Decision of Buckley J. reversed.

In re Lawford and Lawrence, [1902] 2 K. B. 445, overruled.

Course to be adopted by the Court, in the event of the debtor attempting to enforce his rights by action, or in the event of its aid being invoked

to render effective the obligations of third parties towards the debtor or his estate, discussed and stated.

Seemle, in any event the secured creditor is entitled to his costs of action as well as to interest on the amount due until actual repayment.

MOTION.

This was an application for an interim order, which raised the question whether a debtor who has committed an act of bankruptcy has the right to require his secured creditor, who has notice of it, to hand over his securities on payment of the amount due thereon, and, in case of a refusal to hand over, whether the debtor can enforce his rights by action.

The facts were not disputed, and were, shortly, as follows:—Messrs. Ponsford, Baker & Co., stockbrokers, deposited securities with the defendant bank to secure a loan of 10,500*l*. On April 27, 1906, the firm were declared defaulters on the Stock Exchange, and it became the duty of the official assignee of the Stock Exchange to collect the assets of the firm. At this date the bank had standing to the credit of Messrs. Ponsford, Baker & Co. on current account about 1000*l*. On May 15 Messrs. Ponsford, Baker & Co., and the official assignee of the Stock Exchange, tendered to the bank the amount due with interest, and called upon the bank to deliver up the securities, which were worth more than the loan; the bank refused to do so, on the ground that as the official assignee was assignee of all the property of the firm, an act of bankruptcy had been probably committed within three months, of which the bank had notice, and that under the circumstances, and having regard to s. 49 of the Bankruptcy Act, 1883, the bank could not safely hand over the property until the three months had expired without bankruptcy proceedings being commenced against the firm.

Messrs. Ponsford, Baker & Co. and the official assignee thereupon commenced the present action against the bank, and moved for an order that upon payment into Court, or to the defendant bank, by the plaintiffs of the amount due and interest, or of such other sum as the Court might direct, the defendant bank might be directed to deliver up the securities to the plaintiffs, or that the securities might be ordered to be sold forthwith, or, in the alternative, the plaintiffs claimed the usual judgment for redemption of the said securities.

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C. A. Buckley J., on May 25, 1906, considering that the present case was exactly covered by the decision in *In re Lawford and Lawrence* (1), made an order that upon payment to the defendant bank of the amount agreed to be due on the securities, after giving credit for the amount due on Messrs. Ponsford, Baker & Co.'s current account, the securities should be delivered to the plaintiffs. The motion, by consent, was treated as the trial of the action, and the defendants were ordered to pay the costs, and were only to be entitled to charge against Messrs. Ponsford, Baker & Co. interest down to the date of the tender of the money.

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The defendant bank appealed.

The appeal was heard on July 13 and 16.

Warmington, K.C., and *R. J. Parker*, for the appellants. When a stockbroker is declared a defaulter and his assets are vested in the official assignee of the Stock Exchange for the benefit of his creditors, that is an act of bankruptcy: *Tomkins v. Saffery* (2), and by the doctrine of relation back, if a receiving order is made on a petition presented within three months from the act of bankruptcy, the title of the trustee in bankruptcy relates back to the act of bankruptcy: Bankruptcy Act, 1883, s. 43. This doctrine has been in existence from the earliest times, as appears from *Vernon v. Hankey*. (3) The result is that after the default has been made, a banker with whom deeds have been deposited by the stockbroker as security for a loan cannot, on being tendered the full amount of the loan, safely give up his securities; and it makes no difference that the tender was made on behalf both of the stockbroker and of the official assignee of the Stock Exchange. The stockbroker has an equity of redemption, but by the act of bankruptcy he ceases to be owner of that equity in the event of a bankruptcy following within the three months. Unless the transaction is protected by s. 49 of the Bankruptcy Act, 1883, every payment of money on delivery of property to a person who has committed an act of bankruptcy is made at the actor's risk. Buckley J.

(1) [1902] 2 K. B. 445.

(2) (1877) 3 App. Cas. 213.

(3) (1787) 2 T. R. 113.

relied on *In re Lawford and Lawrence* (1), but *Davis v. Petrie* (2) is irreconcilable with that decision, unless a distinction can be drawn between money and goods.

Buckmaster, K.C., and *Felix Cassel*, for the plaintiffs. Sects. 43 and 49 of the Bankruptcy Act, 1883, do not apply to a mortgagee or pledgee who has been tendered the full amount due to him. Unless the doctrine of relation back is modified in the way suggested by Wright J. in *In re Lawford and Lawrence* (1), very serious consequences might ensue. In the present case the securities were of a highly speculative character, and if the bankers continue to hold them they may be worth nothing in the future, and, on the other hand, if the defaulter is able to redeem his securities, he may be in a position to pay all his creditors. It is a principle of the Bankruptcy Act, 1883, not to interfere with the security of a secured creditor. It follows that the bank could have brought an action for foreclosure and could have got a decree nisi, which means that unless the mortgagor redeems within a certain time he is to be foreclosed. That is a dealing by the mortgagee with his security which is protected by s. 9, sub-s. 2, of the Bankruptcy Act. If the mortgagee can pursue his remedy of foreclosure it follows that he is bound to accept payment within the prescribed time. The right of foreclosure necessarily involves the correlative right of redemption. The decision of Wright J. was correct.

[ROMER L.J. The difficulty is that the mortgagor could not make a valid tender. I think the decision in *In re Lawford and Lawrence* (1) was a mere slip on the part of Wright J.]

Further, although the bankers might have been justified in refusing to give up the securities without compulsion of law, compulsion of law is an absolute protection to them: *Foster v. Allanson*. (3) This is really a redemption action to which there was no defence, and the motion was treated as the trial of the action. Buckley J.'s order is in effect a redemption decree. The relation back of the title of the trustee to the first act of bankruptcy has existed ever since 13 Eliz. c. 7; subsequent legislation has merely limited this relation back of the title

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(1) [1902] 2 K. B. 445.

(2) [1905] 2 K. B. 528.

(3) (1788) 2 T. R. 479.

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—

of the trustee till the period is now reduced to a maximum of three months, but this limitation has not altered its nature; in an action at law, or in suit in equity, it is no defence to plead that the plaintiff had committed an act of bankruptcy of which the defendant has notice: *Foster v. Allanson* (1); *Prin v. Beal*. (2)

[VAUGHAN WILLIAMS L.J. referred to Eden's Bankrupt Law, 3rd ed. pp. 266, 267.]

Relation back has no operation where legal proceedings have been commenced; it only applies where payment is made voluntarily and not under legal compulsion: *Prickett v. Down* (3); *Fuller v. Gibson*. (4)

There is a distinction, too, between an order for payment of a debt and an order for delivery up of chattels or securities, and Wright J., in *In re Lawford and Lawrence* (5), proceeded largely on the principle laid down in *Rogers, Sons & Co. v. Lambert & Co.* (6)

A secured creditor may pay rent due to the debtor's landlord with notice of an act of bankruptcy, or may make payments for the protection of the security: *Stevenson v. Wood* (7); *Mavor v. Croome* (8); *Thompson v. Beatson*. (9)

[*King v. Leith* (10) was also referred to.]

These authorities shew the general power of a debtor to resort to the Courts to enforce his rights. In the present case the secured creditor would have been quite safe in accepting the money due on the security.

R. J. Parker, in reply. The securities belonged to the bank subject to the plaintiffs' equity of redemption, but at the time redemption was offered the plaintiffs were not in a position to make a legal tender, and the bank was not bound to hand over the securities. *In re Lawford and Lawrence* (5) was wrongly decided, and as that case was the basis of Buckley J.'s decision in this case, his decision was wrong.

(1) 2 T. R. 479.
(2) (1673) 3 Keb. 231. S.C., sub
nom. *Pym v. Benson*, 1 Freeman, K. B.
349.

(3) (1811) 3 Camp. 131,
(4) (1788) 2 Cox, 24,

(5) [1902] 2 K. B. 445.
(6) [1891] 1 Q. B. 318.
(7) (1805) 5 Esp. 200.
(8) (1823) 1 Bing. 261.
(9) (1823) 1 Bing. 145.
(10) (1787) 2 T. R. 141.

The old cases relied on to shew that notice of an act of bankruptcy is no defence do not apply here; they relate mainly to the protection afforded for payment under compulsion of law, or for the surrender of some lien. In *Fuller v. Gibson* (1) equity declined to interfere because the common law had jurisdiction. Much the same argument was unsuccessfully addressed to the Court in *Davis v. Petrie* (2), which is inconsistent with *In re Lawford and Lawrence*. (3)

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[VAUGHAN WILLIAMS L.J. referred to *Allen v. Dundas* (4) and *Wood v. Dunn*. (5)]

The border line cases are all collected and dealt with in Williams' Bankruptcy Practice, 8th ed. pp. 181, 182.

As the plaintiffs could not make a legal tender Buckley J. was wrong in ordering the bank to pay costs; the utmost that should have been done would have been to order the money into Court or to direct the bank to hand the securities to a receiver, when appointed, until it could be seen whether bankruptcy proceedings were going to be taken.

Cur. adv. vult.

Aug. 9. The judgment of the Court (Vaughan Williams, Romer, and Fletcher Moulton L.JJ.) was delivered by

FLETCHER MOULTON L.J. The facts of the present case, so far as they are material, are very simple. Messrs. Ponsford, Baker & Co., having become defaulters on the Stock Exchange, made an assignment of all their assets to the official assignee of the Stock Exchange for the benefit of their creditors. At the date of such default they had a loan account at interest with the defendants, the Union of London and Smith's Bank, Limited, which was secured by certain securities lodged with that bank, and, inasmuch as the debtors and the official assignee were of opinion that it was desirable in the interests of the estate to redeem those securities, they tendered to the bank the amount due by the debtors and called on the bank to hand over the securities. The

(1) 2 Cox, 24.

(3) [1902] 2 K. B. 445.

(2) [1905] 2 K. B. 528.

(4) (1789) 3 T. R. 125.

(5) (1866) L. R. 2 Q. B. 73.

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bank, however, having notice of the assignment to the official assignee (which is unquestionably an act of bankruptcy), refused to accept the tender of the money or to hand over the securities, and thereupon the debtors and the assignee, as joint plaintiffs, commenced this action against the bank, claiming the return of the securities and damages for their wrongful detention, or, in the alternative, judgment for the redemption of the securities. On May 25, 1906, an interlocutory motion in the action was made before Buckley J. for an order that on payment to the defendants of the sum due from the debtors to the bank the securities should be given up to the plaintiffs, and affidavits were filed bringing before the Court the facts of the case, which are not in any wise in dispute. By consent of the parties the motion was taken to be the hearing of the action, and the learned judge made an order in the terms of the motion, giving the plaintiffs the costs of the action and providing that the defendants should only be entitled to charge against the debtors interest down to the date of the tender of the money. In other words, he treated the refusal of the defendants to accept the tender of the money before action as wrongful. Before passing to the substantial question in this case, we hold that the consent to treat the motion as the trial of the case does not in any way affect the rights of any of the parties. In a case like the present where all the facts are before the Court such a procedure is nothing more than a legitimate device on the one hand to expedite the final hearing, and, on the other, to save the time of the Court from being taken up uselessly. The arguments in this case have raised important and difficult questions involving a consideration in its most general form of the effect of the provisions of s. 43 of the Bankruptcy Act, 1883, by virtue of which the title of the trustee in bankruptcy relates back to the earliest act of bankruptcy committed by a bankrupt within a period of not more than three months prior to the presentation of the bankruptcy petition. These arguments fall under two heads, the first dealing with the general power of a debtor who has committed an act of bankruptcy to use the Courts for the purpose of enforcing his rights against third parties, and the second dealing specifically with his power of enforcing, either with or without the assistance of the

Courts, the special rights which exist in the case of a person who has borrowed money on security. It will be convenient to deal with the points in this order. The argument of the respondents under the first head was as follows:—Relation back of the title of the trustee in bankruptcy (meaning thereby the person in whom the bankrupt's estate becomes vested by the bankruptcy, by whatever name he may have been called) has existed under English statute law ever since 13 Eliz. c. 7. In that statute the formal bankruptcy might take place at any time subsequent to an act of bankruptcy and the title of the trustee dated back to the date of the act of bankruptcy—*i.e.*, he was entitled to the possession of the bankrupt's property such as it was at that date. The effect of subsequent legislation has been, not to create, but merely to limit this relation back until, under the Acts now in force, its period has been reduced to a maximum of three months, so that if the requisite bankruptcy proceedings are not taken within that period, the act of bankruptcy ceases to be effective, and there can be no relation back to the date of that act of bankruptcy even though bankruptcy should subsequently supervene. But it is urged that this process of limitation of the extent of relation back has not altered its nature. Numerous cases under the earlier statutes were referred to which establish that an act of bankruptcy in the plaintiff, though known to the defendant, constituted no defence at common law to an action for debt, and one case was cited to us to shew that a Court of Equity would decline to interfere with an action at common law if brought under such circumstances. It was contended, therefore, that relation back had no operation where legal proceedings were concerned, but only where payment was made voluntarily and not under legal compulsion, and it was suggested that the explanation of this apparent contradiction of the doctrine that a debtor may not pay a debt to his creditor after notice of an act of bankruptcy available for adjudication is that the legal proceedings enable the defendant in the action to obtain a valid discharge of his debt (which could not otherwise have been given to him by his creditor) by reason of the well-established doctrine that payment under the order of a Court of competent jurisdiction is a complete answer to a claim. The results of such a doctrine are

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1906 law than that a man who has committed an act of bankruptcy
PONSFORD, is not entitled to deal with his estate. He has no right to
BAKER & CO. gather it in if it is not already in his hands or to make payments
v. to his creditors out of that which he has actually at his
UNION OF command. He can give no good discharge to a debtor who pays
LONDON AND him with notice of the act of bankruptcy, because the debt may
SMITH'S by subsequent bankruptcy proceedings be turned into a debt due
BANK, to his trustee, and not to himself. This is a principal and
LIMITED. fundamental part of our bankruptcy administration, and yet if
— the doctrine contended for were established, the mere issue of a
writ would nullify the whole of the precautions taken by the
Legislature in this respect. The debtor having no defence could
not prevent judgment being recovered and execution had, and if
such claims could thus be enforced notice of an act of bankruptcy
would be no impediment to a debtor effectively collecting and
getting into his own hands all moneys due to his estate. We are
of opinion, however, that this doctrine is not well founded. For
the purpose of deciding this point it is necessary to examine
carefully the exact legal position of a man who has committed
an act of bankruptcy under the statutes at present in force.
Until commission of the act of bankruptcy he was, of course, the
beneficial owner of whatever assets he possessed, but by the act
of bankruptcy his title to be regarded as such beneficial owner is
no longer absolute, but is contingent on no bankruptcy petition
being presented within three months of the date of the act of
bankruptcy which leads to a receiving order being made. If such
receiving order be made the whole of the assets vest in his trustee
as from the date of the act of bankruptcy. He is, therefore, in
the position that should such a contingency occur he is from
the date of the act of bankruptcy something less than a mere
trustee of his assets for the creditors in his bankruptcy.
Until this state of suspense has been removed either by a
receiving order or by lapse of time, he has no right to deal
with those assets that were in his hands, and can give no title
in them to any transferee with notice. Similarly, with regard to
the debts and other choses in action which form part of his
estate, he cannot collect them or give a valid discharge for them,

and anyone making a payment to him with notice of the act of bankruptcy does so at his peril. But these statutory provisions have been enacted for the benefit only of the creditors of the bankrupt, and not for the benefit of his debtors. They are not intended in any way to weaken or postpone the duties of the debtors of the estate to discharge their obligations to it, nor is this period of three months from the act of bankruptcy intended to act in any wise as a moratorium to those debtors so as to give them relief or respite from payments immediately due. It may be greatly in the interest of the estate that these obligations should be promptly enforced, and therefore the probable imminence of effective bankruptcy proceedings furnishes no motive to the Court for interposing any delay in the use of its normal procedure to compel their fulfilment. But the debtor is the only person who at the moment can initiate legal proceedings for this purpose, and hence the Courts have naturally refused either to treat him as incapable of bringing an action, or to regard notice of an act of bankruptcy on his part as offering a defence to such an action if otherwise well founded. The difficulties and complications that arise from his commission of an act of bankruptcy have in their nature nothing in common with matter of defence. They do not weaken the obligations of the defendant in such an action, they only affect the question who is to benefit by the performance of those obligations. But although there is no reason why any delay should be interposed in requiring the defendant in such a case duly to discharge his legal liabilities, it does not follow that the consequence of a judgment against him ought to be that the money recovered is paid to the plaintiff. The statutes clearly provide that payments shall not be made to the debtors with knowledge of the act of bankruptcy, thus indicating that the law does not consider him the proper person to collect his estate. Now it is quite true that if payment be made under order of the Court the defendant who makes the payment obtains thereby a valid discharge, but so far from this fact establishing the right of the plaintiff to receive the results of the judgment, it only puts the Court on its guard against allowing its process to be used as a means of defeating the clear purpose of the bankruptcy laws. The powers of the

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1906 The safe and, in our opinion, the right course for the Court to
PONSFORD, pursue after notice of an act of bankruptcy on the part of the
BAKER & CO. plaintiff is to direct the money recovered from the defendant
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UNION OF to be kept in Court until it shall be seen whether the person who
LONDON AND is entitled to it is the plaintiff or the representative of his estate.
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BANK, This is the natural and proper result of the action, because the
LIMITED. Court, being made aware of the act of bankruptcy, is informed of
— the flaw in the plaintiff's title, and while it can decide that the
defendant is liable to pay, cannot at the moment decide who is
entitled to receive the money recovered under the judgment.
We are aware that in the cases which have been quoted to us no
such course was pursued. We must, however, remember that
prior to the Judicature Act the powers of a Court of common
law to adapt its procedure to the necessities of the particular
case before it were far more restricted than they are at present,
when it has all the powers of the Court of Chancery. But there
is a further reason. Under the older Acts the relation back was
unlimited as to time. Under the statute of Elizabeth bank-
ruptcy proceedings might be taken at any date, and the title of
the assignee would relate back to the earliest act of bankruptcy,
so that during the whole of the rest of the man's life there
would be the possibility of setting aside any transactions relating
to his then estate to which he had been a party. This was so
extravagant and harsh that the Courts would naturally lean
against the application of the principle and would be unlikely to
exercise any powers they might possess of keeping the results of
a judgment in suspense for what might, and perhaps must, be
an unlimited time. Having established the principle that the
judgment constituted a good discharge to the defendant they
were almost forced to allow the creditor to enjoy the results of
the judgment, because there might for an indefinite time be no
other representative of the estate. If the judgments in the case
of *Foster v. Allanson* (1) (which is relied on as establishing that
an act of bankruptcy by the plaintiff is no defence) be examined
it will be seen that the judges gave weight to the consideration
that a long time had elapsed since the act of bankruptcy had

(1) 2 T. R. 479.

taken place, and that further bankruptcy proceedings were unlikely. They also expressly guard themselves from being supposed to say that payment in such circumstances under a judgment obtained by collusion would be a good discharge, though it is difficult to understand what collusion could exist in the payment of a debt admittedly due, and which they had just decided was enforceable, if it did not mean that the process of law was being used by the parties to evade the responsibilities imposed by the bankruptcy laws. The period during which bankruptcy proceedings must be taken so as to give rise to relation back is so definitely limited under the present laws to the comparatively short period of three months that the Court is faced by no such difficulty, and, in our opinion, it is its duty to give full effect by all the means which its procedure permits to the substance of the bankruptcy enactments with regard to the property of a man who has committed an act of bankruptcy, and the procedure which we have indicated appears to us to be within the power of the Court and to be effective for this purpose, and it should therefore be followed. We have examined thus fully the case of the recovery of a debt after notice of an act of bankruptcy by the plaintiff, because it is the simplest case of legal proceedings for collecting the estate, and because the decisions in relation to it were those mainly relied on by the respondents to support their contention that notice of an act of bankruptcy has no effect upon legal proceedings. But the actual case before us is the more complicated case of a secured creditor, and we will now pass to the second point, which deals with the special rights arising from the existence of that relationship. In the present case tender of the amount due to the bank was made by the defaulting debtor and the official assignee of the Stock Exchange jointly, and the action is brought in their joint names. But for simplicity's sake we shall assume that it was done by the debtor alone. The addition of the assignee could not give additional rights to or impose additional obligations upon any one, seeing that his title rested on an assignment which was in itself an act of bankruptcy. The question, therefore, is this: Has a person who has committed an act of bankruptcy the right to require a secured creditor who has notice of it to give up his

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securities on payment of the amount due, and can he, in case of refusal, enforce that right by action? It was at first urged that s. 9, sub-s. 2, of the Bankruptcy Act, 1883, assisted the respondents. This sub-section reads as follows: "But this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed." We are of opinion that this sub-section has no application to the present case. Even if the secured creditor might safely have accepted the money and given up the securities under that section, he has not done so, and this is an action brought against him to compel him to do so. An enabling provision such as the one referred to imposes no obligation on the secured creditor, in whose interests it is passed, to act under the powers there given, and therefore could not support the present action. But although it is not necessary to pronounce any opinion on the subject it must not be supposed that we give any countenance to the view that this sub-section would entitle the creditor to receive payment of his debt from his debtor and give up the securities provided he had notice of the act of bankruptcy. The invalidity of such a transaction would arise not from any limitation in the creditor's power of dealing with the securities, but from the fact that the person who proposed to pay the money was personally incapacitated from making any such payment or from receiving the securities in return for the same. This is no real limitation of or encroachment upon the creditor's power to deal with the securities. It is only a consequence of his debtor having incapacitated himself from tendering the money. The main question, however, depends on the point decided by Wright J. in the case of *In re Lawford and Lawrence*. (1) The decision in that case was, of course, binding on Buckley J., and warranted, and indeed compelled, him to decide the present case in the way that he did decide it. In that case the learned judge held that a pledgee of goods remained subject to the duty to re-deliver the goods to the pledgor on receipt of the money due and had a right to discharge himself of that liability under the contract, even though the

(1) [1902] 2 K. B. 445.

pledgor had to his knowledge committed an act of bankruptcy prior to the tender of the money. He seems to have been influenced in his decision by a supposed distinction between goods and money in respect of the relation back of the title of a trustee under s. 43 of the Act of 1883 and the provisions as to the protection of certain bona fide transactions under s. 49 of that Act. We can see no justification for holding that there is any such distinction between goods and money, nor do the decisions give warrant for it. Sect. 43 relates generally to the property of the bankrupt without distinguishing whether it is goods or money, and s. 49 speaks of "payment or delivery to the bankrupt," the word "delivery" obviously referring to the delivery of goods. Nor is there any reason in the nature of things why the Bankruptcy Act should make any such distinction between goods and money. In our opinion the learned judge failed to realize that by the act of bankruptcy the pledgor disqualified himself from making a tender to his pledgee and that, therefore, it was not open to the latter to accept the money. We are of opinion, therefore, that a secured creditor is not entitled to receive payment of the debt from his debtor after notice of an act of bankruptcy. But, as in the case which has already been examined at length, we see no reason why this should prevent the help of the Courts being called in to render effective the obligations of third parties towards the debtor or his estate. There seems to us to be no sufficient ground why notice of an act of bankruptcy should necessarily form a defence to an action of redemption any more than to one of debt, subject to the Court properly safeguarding the consequences of its acts. But the problem here is much more complex. In the first place, it is clear that the Court must do nothing to prevent the creditor from dealing with the securities in any way in which he is entitled to deal with them by virtue of his contract with the debtor so as to repay himself the money due to him. Nor can the Court require the creditor to surrender the securities without authorizing the payment to him of the amount due thereon. But, even with these restrictions, the aid of the Court may, with advantage, be invoked in many cases. Whereas in the present case there is an assignee who is not incapacitated from making

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payments, the Court might direct the defendant to deliver up the securities on payment by the assignee of the amount due, such securities to be held by him until it is decided whether bankruptcy will ensue or not. In such a case, inasmuch as the Court would act upon equitable principles, the assignee would, in case of bankruptcy supervening, be relegated to the position of the secured creditor, and the trustee in bankruptcy could only obtain the securities by repayment of the sum paid by the assignee to obtain their delivery over to him. And even in certain cases where the action was brought by the bankrupt alone, the Court might sanction the payment by the bankrupt himself in order to save the estate from suffering disproportionate injury, on principles analogous to the case in which the Court has held that payments to save forfeiture were good against the trustee in a subsequent bankruptcy where the estate has benefited by the forfeiture having been thus averted. But we apprehend that, in cases where it was not clearly to the interest of the estate that the securities should be redeemed, the Court would hold its hand and would not permit the debtor's estate to be used in this way until it was clear whether or not the debtor or his trustee in bankruptcy were the party entitled to redeem. A creditor is a secured creditor whether or not the securities are adequate to protect him from loss, and the Court would, we think, be averse to authorize an election by the debtor to redeem the securities when it might well happen that his trustee in bankruptcy might prefer not to do so. In the present case the learned judge has, by his judgment, treated the defendants as having wrongfully refused to allow the debtor or his assignee to redeem. For the reasons above given, we are of opinion that this judgment was wrong and should be set aside. If the assignee is prepared to pay the money due on the securities and to undertake to hold them until bankruptcy proceedings are taken, or the period of three months has expired, we are of opinion that we ought to make an order empowering him so to do. But, if he is not, we do not think that we ought to give any immediate judgment in this action, but ought to direct it to stand over until it can be seen who is the person entitled to redeem. There is no such clear balance of

advantage shewn by the evidence as would, in our opinion, justify us in treating this as a case in which a payment should be made of the nature of salvage. But, whatever be the order in these respects, the defendants are entitled to their costs of action, as well as to interest on the amount due until actual repayment, and they are entitled until repayment to exercise any rights they may possess enabling them to realize the securities. They are in the position of secured creditors to whom no tender has been made, because the so-called tender before the action was one which they were not entitled to accept.

Solicitors : *Hollams, Sons, Coward & Hawksley; Morley, Shirreff & Co.*

W. C. D.

In re SALVIN.
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[1906 S. 868.]

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Will—Power to charge limited Sum on Real Estate—General Gift of Personality—Effect as to exercising Power to charge Realty—Wills Act, 1837 (1 Vict. c. 26), s. 27.

Sect. 27 of the Wills Act presupposes the existence of some realty or personality, as the case may be, which is subject to a general power of appointment, and at the testator's uncontrolled disposition although not his property; and the section does not extend to the imposition of an otherwise non-existent charge, upon the property of another person, which if and when created would be personal estate which the testator would have power to appoint by a general bequest.

The reasoning of FitzGibbon L.J. in *In re Wallinger's Estate*, [1898] 1 I. R. 139, adopted and followed.

Where, therefore, testator had under a settlement power by deed or will to charge real estate, of which he was only tenant for life, with payment to himself or any other person or persons of any sum or sums not exceeding in the whole 6000*l.*, with interest at a rate not exceeding 5 per cent., and to appoint the premises charged to any person for any term of years upon trusts for raising the sums charged, and by his will he gave all his real property to one person and all his personal property (except some pecuniary legacies) to the children of his sisters:—

Held, that the gift of personality did not operate as a charge, in favour of the donees, on the real estate which he had power to charge.

In re Jones, (1886) 34 Ch. D. 65, distinguished.

By a settlement, dated April 30, 1870, certain hereditaments called the Burn Hall Estate, in the county of Durham, were

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conveyed to uses in favour of Marmaduke Charles Salvin and his assigns for life, and after his death of Bryan John Francis Salvin and his assigns for life, and after his death to the use of the first and every other son of the said B. J. F. Salvin successively in remainder and the heirs male of their respective bodies, and in default of such issue, to the use of Marmaduke Henry Salvin and his assigns for life, and after his death to the use of the first and every other son of Marmaduke Henry Salvin successively in remainder and the heirs male of their respective bodies, and in default of such issue to the use of such son and sons of Marmaduke Charles Salvin as might thereafter be born, and the heirs male of their respective bodies successively in remainder, and in default of such issue to the use of the first and other sons of B. J. F. Salvin successively in tail general, with remainder to the use of the first and other sons of Marmaduke Henry Salvin successively in tail general, with remainder to the future sons of Marmaduke Charles Salvin successively in tail general, with remainder to the use of the first and other daughters of B. J. F. Salvin successively in tail male, with remainder to first and other daughters of Marmaduke Henry Salvin successively in tail male, with remainder to the eldest daughter of Marmaduke Charles Salvin for life, and after her death to her sons successively in tail male, with remainder to the other daughters of Marmaduke Charles Salvin for their respective lives, and after their respective deaths to the use of their sons in tail male, with certain limitations over.

The settlement also contained the following clause: " Provided always and it is hereby further agreed and declared between and by the parties to these presents that it shall be lawful for the said Bryan John Francis Salvin in case under or by virtue of the limitations hereinbefore contained he shall become entitled to the actual possession or to the receipt of the rents, issues and profits of the said hereditaments hereby settled, but not otherwise, at any time or times after he shall have become so entitled, but subject and without prejudice to the uses, estates and limitations hereby limited antecedent to the estate for life hereby limited to the said Bryan John Francis Salvin and to the exercise of the powers thereto appendant or every of them by

any deed or deeds . . . or by his last will and testament in writing or any codicil thereto to charge all or any part of the said hereditaments and premises with the payment to him the said Bryan John Francis Salvin or any other person or persons at such times and for such purposes and in such manner in all respects as the said Bryan John Francis Salvin shall think proper of any sum or sums of money, not exceeding in the whole the sum of 6000*l.*, with interest for the same after such rate as shall not exceed the rate of 5 per cent. per annum and to appoint the premises so to be charged to any person or persons for any term of years without impeachment of waste upon trusts for raising the sum or sums so to be charged and the interest thereof."

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Marmaduke Charles Salvin died in 1885, leaving two sons, B. J. F. Salvin and Marmaduke Henry Salvin, and four daughters, the eldest of whom married Philip Witham, and thereupon B. J. F. Salvin became entitled in possession to the settled estates. B. J. F. Salvin died a bachelor on October 11, 1902, having made a will (proved by Edward Gleadow Marshall and Robert Baker) by which, after making certain pecuniary bequests, he proceeded as follows: "All my real property I give to the tenant for life of the Burn Hall Settled Estate, and all the rest of my personal property among the children of my four sisters equally." By his death Marmaduke Henry Salvin became tenant for life of the Burn Hall Estate. He was married, but there was no issue of the marriage.

Charles Witham was the only child of Mrs. Witham. Two of her sisters had also children.

An originating summons was taken out by E. G. Marshall and R. Baker, executors of B. J. F. Salvin, against Sir Charles Michael Wolseley, Bart., and S. C. Scrope, the trustees of the settlement of April 30, 1870, Marmaduke Henry Salvin, as tenant for life of the hereditaments thereby settled, and Charles Witham, the person claiming to be entitled to the first subsisting estate of inheritance in remainder under the settlement, for the determination of the question whether the gift in the will of "all the rest of my personal property" operated as an exercise by B. J. F. Salvin of the power reserved to him by the settlement to charge

BUCKLEY J. the hereditaments thereby settled with the payment to him, or any other person or persons, of the 6000*l.* and interest.

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Buckmaster, K.C., and *George Lawrence*, for the plaintiffs. The power to appoint 6000*l.* and charge it on the real estate has been well exercised by the general bequest of residue. This is equivalent to a general power of appointment over property to the extent of 6000*l.*, and by virtue of s. 27 of the Wills Act it is exercised by the general bequest of residue. It is clear that if the 6000*l.* had already been charged the power would have been well exercised. It makes no difference that the fund has not in fact been charged on the property in the first instance, and that the power to charge is associated with the power of appointment.

[BUCKLEY J. The 6000*l.* did not exist at all; the testator might have created it, but has not done so.]

It was not necessary to create it before dealing with it. He had power to appoint it, and then it must be raised. He could exercise the power of appointment in no other way than by charging the land. The fact that the money was to be charged on real estate makes no difference: *In re Jones*. (1)

[BUCKLEY J. In that case there was a direction to convert, and the whole estate was thus made one personal fund. What is there to shew that this testator intended to appoint the whole of the 6000*l.* ?]

The presumption from the general bequest is that the power was exercised to the full. It is the same as a power to appoint 6000*l.* or any part of it. There is a decision to the contrary—*In re Wallinger's Estate* (2)—but it is not binding on this Court.

Upjohn, K.C., and *F. H. Schwann*, for the tenant for life of the settled estates. This case does not fall within s. 27 of the Wills Act, for this is not a general power of appointment. It is not a power to appoint real estate. It is only a power to appoint personal estate, and there is none in existence. It is like a power of revocation and new appointment: it may be exercised in one and the same instrument, but two things are done; previous limitations are revoked, and then, and not till then, can an appointment be made. A power to revoke and appoint is

(1) 34 Ch. D. 65.

(2) [1898] 1 I. R. 139.

not exercised by general words of appointment if there is any other power to which they can refer. A general gift does not exercise a power of revocation: *Charles v. Burke* (1); *In re Brace*. (2) The principle applies to the power conferred by this settlement, which is a power to charge land and appoint the resulting fund, and requires two operations for its exercise: *In re Goulding's Settlement*. (3) This point is covered by *In re Wallinger's Estate*. (4) That was a decision of the Irish Court of Appeal, and is directly in our favour. It was there held that *In re Jones* (5) was distinguishable, on the ground that it depended on the construction of that particular will. Kay J. held that it was all one power. This 6000*l.* only existed by way of power, and the statute does not apply so as to enable a man to create property by way of power and then appoint it. If Kay J. had come to a different conclusion on the question of construction he would have decided *In re Jones* (5) the other way. In the present case the general scope of the settlement shews that it was not the intention of the parties that the power should be exercised in this way. It was intended to be two powers, not, as in *In re Jones* (5), one power.

C. Ashworth James, for Charles Witham. But for *In re Jones* (5), it would be clear that the bequest did not operate as an appointment, and that case is distinguishable. The statute must be strictly construed, and to hold that the will exercised the power to charge would be going beyond it.

Dunham, for the trustees of the settlement.

Buckmaster, K.C., in reply.

BUCKLEY J. The will of Bryan John Francis Salvin, dated January 13, 1897, contains the following words of gift: "All my real property I give to the tenant for life of the Burn Hall Settled Estate, and all the rest of my personal property amongst the children of my four sisters equally."

The question for decision is whether by that will he exercised

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(1) (1888) 43 Ch. D. 223, n.

(3) (1899) 48 W. R. 183.

(2) [1891] 2 Ch. 671.

(4) [1898] 1 I. R. 139.

(5) 34 Ch. D. 65.

BUCKLEY a general power contained in a settlement of April 30, 1870,
J. to charge not exceeding 6000*l.* upon real estate, and appointed
1906 the resulting sum.

SALVIN, That settlement was one by which real estate was settled in
In re. strict settlement, Marmaduke Charles Salvin being the first and
MARSHALL Bryan John Francis Salvin the second tenant for life. Subject
v. to those life interests the limitations were to the first and every
WOLSELEY. other son successively of Bryan Salvin and the heirs male of
their respective bodies, with subsequent limitations in favour of
the daughters and younger sons of Marmaduke Charles Salvin
and their issue successively in tail, with various limitations over,
and the power in question was contained in a proviso that it
should be lawful for Bryan, in case he should become entitled in
actual possession, by deed, with or without power of revocation,
or by will, to charge the premises with payment to him, Bryan,
or any other person, at such times and for such purposes and in
such manner as Bryan should think proper, of any sum not
exceeding 6000*l.*, with interest at 5 per cent., and to create a
term for raising the sum so to be charged. Bryan survived
Marmaduke, thus became entitled in actual possession, and died
without having exercised the power by deed. The question is
whether he exercised it by will.

Sect. 27 of the Wills Act is divided into two parts, the first relating to real estate and the second to personal estate. A general devise of real estate is to be construed to include any real estate which the testator has power to appoint in any manner he may think proper, and a bequest of personal estate is to be construed to include any personal estate which he has power to appoint in any manner he may think proper. I am unable to find here any words which provide that, where there is a power to charge upon real estate a sum which when charged will be personal estate, general words of gift are to be construed as effecting, first, the creation of the personal estate by charging it on the real estate, and, secondly, the bequest of the personal estate thus created.

From the judgment of FitzGibbon L.J. in *In re Wallinger's Estate* (1) I quote the following, and adopt it as expressing

(1) [1898] 1 I. R. 148.

exactly that which seems to me to be the effect of the section: "According to its natural construction, this section appears to me to presuppose the existence of some real estate, or some personal estate, as the case may be, which is at the time subject to a general power of appointment, and which, though not the testator's property, is at his disposition under a general power. A general gift of property described as his own will then, under the section, operate to dispose of the subject-matter of the power by way of appointment. In short, the statute alters the law as to the sufficiency of general words of gift to operate as words of appointment—or rather, the presumption that they are intended so to operate—in the case of property which is at the time absolutely at the testator's disposal. But I cannot think that the language of the section naturally extends to the creation of property at the expense of another, or to the imposition of an otherwise non-existent charge upon the property of another, or to the conversion pro tanto of the real estate of another into a money-charge which, if and when charged, will be personal estate which the testator will have power to appoint in any manner he may think proper, but which has no existence at all unless and until the testator creates it. It seems to me that we are asked to presume the intention to create a subject-matter, in the shape of personal estate, in order that the Wills Act may operate upon it, and that this is an extension of the Act which its language does not justify, and which goes beyond the usual or natural intention of testators to which the Act desired to give effect."

To charge the money upon the real estate is one thing, to appoint the money when so charged is another. At the date of the death of Bryan Salvin there was no sum of 6000*l.* or any other amount in existence. The contention is that the general bequest has a double effect—viz., first, that of creating the fund; and, secondly, that of appointing it when created. I do not find anything in the Act which gives to the general bequest this effect.

In *Pomfret v. Perring* (1), *Charles v. Burke* (2), and *In re Brace* (3) it has been held that a general devise or bequest will

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(1) (1854) 5 D. M. & G. 775.

(2) 43 Ch. D. 223, n.

(3) [1891] 2 Ch. 671.

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not under s. 27 per se amount to an exercise of a power of revocation and new appointment. Revocation is one thing and appointment another. The principle of those cases seems to me applicable to the present question. The creation of the fund by charging it on the real estate is one thing, the appointment of the fund when charged is another.

There is, however, an authority in this Court, a decision of Kay J., by which, if I thought it applicable, I should consider myself bound, viz., *In re Jones*. (1) I think it distinguishable. The testator there directed the conversion of all his residuary real and personal estate, and declared that, notwithstanding the trusts thereinbefore declared (being certain trusts in favour of beneficiaries), it should be lawful for his wife by will to appoint that any sum not exceeding 20,000*l.* should after her decease be raised and paid to or for the benefit of such persons as she should think fit. The trust for conversion made the whole property one personal fund, and Kay J. held that the power in the will was practically a power to appoint part of a residuary fund. There was no question there, as there is here, of creating out of real estate a sum of money which, when created, would be subject to a power of appointment. The fund existed as a personal fund, and the learned judge considered that the power was simply a power to appoint part of it. The word "raise" there was not used in any way in the same sense or with the same result as the word "charge" is used here. The word "raise" simply meant that to pay money some part of the investments which were already personal estate would have to be sold. The word "charge" here means the creation of the personal fund by charging the real estate with it.

Further, as regards the argument arising upon the cases which relate to a power of revocation and new appointment, it is noticeable that the language in *In re Jones* (1) was that, "notwithstanding the trusts hereinbefore declared," the wife might appoint. In other words, the power of appointment stood in exactly the same position as if it had stood first in the will as an overriding power preceding all trusts in favour of beneficiaries. In such case no question of revocation could arise. Upon both these grounds I

(1) 34 Ch. D. 65.

think that the present case is not governed by *In re Jones*. (1) On the other hand, the facts in the Irish case of *In re Wallinger's Estate* (2) are such as that I think the principle of that case is directly applicable to the present. The decision is, of course, not binding in this Court, but is deserving of the highest respect. Had I thought *In re Jones* (1) applicable, I should have felt bound to follow it, but I think it distinguishable. I adopt and follow the reasoning of FitzGibbon L.J. in *In re Wallinger's Estate* (2), and am of opinion that Bryan Salvin's will did not exercise the power.

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Solicitors for plaintiffs: *Lee & Pembertons*.
Solicitors for tenant for life and trustees of settlement: *Tarry, Sherlock & King*.
Solicitors for defendant C. Witham: *Witham, Roskell, Munster & Weld*.

F. E.

In re JACKSON & BASSFORD, LIMITED.

[0079 of 1906.]

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July 17.
—

Company—Winding-up—Fraudulent Preference—Registered Debenture issued pursuant to antecedent unregistered Agreement—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 164—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 14.

A company with a small paid-up share capital was incorporated in March, 1904. It was composed of seven members of the families of J. and B. W. J. was its "permanent director" and the holder of the bulk of its shares, and his son and J. B. were the other directors. The company had a large turnover necessitating more money, and in December, 1904, asked for an overdraft from its bankers. The bank required the guarantee of W. J., and at a meeting of the directors it was resolved that he should be empowered to arrange the overdraft and be requested to secure the same by deposit of securities or otherwise, and that the company should, "whenever called upon by him to do so," give him security over its assets by means of debentures or other charge for the amount for which he should be liable. The overdraft was obtained, and W. J. deposited securities of his own to cover it. In February, 1905, the overdraft was increased, a similar resolution being passed. Neither agreement

(1) 34 Ch. D. 65. (2) [1898] 1 I. R. 139.

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was registered. On December 8, 1905, W. J. wrote to the company asking for his debenture, and the same day the other directors resolved to give it to him. He received on December 15 a debenture charging all the company's assets with payment of the amount of the overdraft, and this debenture he registered on December 31 under s. 14 of the Companies Act, 1900. On December 29 the directors resolved to call a meeting of the shareholders to pass an extraordinary resolution for voluntary winding-up, and the resolution was passed on January 1, 1906. The company was unable to pay its creditors in full:—

Held (applying the principle of *Ex parte Fisher*, (1872) L. R. 7 Ch. 636; *In re Gibson*, (1878) 8 Ch. D. 230; and *Ex parte Kilner*, (1879) 13 Ch. D. 245), that, as the giving of the debenture was purposely postponed until the company was insolvent, in order to preserve the destruction of its credit which would result from registration, the postponement was evidence of an intention to give W. J. a fraudulent preference, and that on that ground the debenture was invalid.

Ex parte Hauxwell, (1883) 23 Ch. D. 626, distinguished.

JACKSON & Bassford, Limited, was incorporated on March 2, 1904, with a nominal capital of 5000*l.* divided into shares of 1*l.* each. Its principal object was to carry on the business of boot and shoe manufacturers.

The signatories to its memorandum of association were William Jackson, Mrs. Mary Ellen Jackson, Frederick James Bassford, Arthur Jackson, Miss Gertrude Jackson, Miss Beatrice Jackson, and Mrs. Emma Bassford.

Mary Ellen was the wife of William Jackson, and Arthur, Gertrude, and Beatrice were his children; Mrs. Bassford was the wife of F. J. Bassford.

The articles of association provided that William Jackson, Frederick James Bassford, and Arthur Jackson should be the first directors, and that William Jackson should be entitled to retain office during life, and whilst holding office by virtue of that provision should be called "permanent director."

The total paid-up capital was only 807*l.*, William Jackson holding 501 shares, Bassford and Arthur Jackson holding 151 shares each, and Mrs. and the Misses Jackson and Mrs. Bassford holding one share each.

William Jackson was a leather merchant, and supplied the company with goods, for which he was paid by cheques on the banking account below mentioned. The company, being in want of money, applied to its bankers for an overdraft, which

the bank was willing to allow on certain terms, including a guarantee by William Jackson personally.

At a meeting of the directors of the company held on December 8, 1904, at which all three directors were present (as shewn by the minutes) "the company's overdraft with their bankers was considered, and it was resolved on the proposition of Mr. F. J. Bassford, seconded by Mr. A. Jackson, that Mr. William Jackson be empowered to arrange an overdraft for the company with the bank and that he be requested to secure same to the satisfaction of the bank by a deposit of securities belonging to him personally or otherwise by his own guarantee, such liability by him not to exceed the total sum of 2500*l.* at any time. Resolved on the proposition of Mr. F. J. Bassford, seconded by Mr. A. Jackson, that in consideration of Mr. William Jackson arranging such overdraft as is referred to in the last resolution the company shall, whenever called upon by him to do so, give full and sufficient security over its assets by means of debentures or other charge in respect of the amount for which he shall render himself liable."

William Jackson accordingly arranged with the bank for an overdraft of 2500*l.*, and deposited with it securities of his own by way of guarantee for the overdraft.

The company requiring more money, the overdraft was again considered at a board meeting held on March 1, 1905, when all three directors were present, and similar resolutions were passed as to increasing the overdraft to 4000*l.* and giving William Jackson security for his liability.

On December 8, 1905, William Jackson wrote to the company as follows: "In accordance with the resolution of the board of directors of the company passed on the 1st day of March, 1905, I must ask that arrangements be immediately made to give me full and sufficient security by means of a debenture or other charge over the company's assets in respect of the amount for which I am now liable to the Bradford and District Bank on the company's account."

At a board meeting held the same day the letter was considered, and Bassford and A. Jackson passed a resolution that the company's solicitors should be instructed to prepare and

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BUCKLEY submit for execution a debenture on the company's assets in
J. favour of William Jackson to secure the amount for which he
1906 was liable to the bank.

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The debenture was sealed and issued by the same two directors at a board meeting held on December 15, 1905, and was to secure 3600*l.* and interest. The debenture created a charge for the 3600*l.* and interest on the company's undertaking and all its property, present and future, including its uncalled capital, by way of floating security, but so that the company was not to be at liberty to create any mortgage or charge in priority to or *pari passu* with it.

The debenture was registered under s. 14 of the Companies Act, 1900, on December 31, 1905.

The overdraft at this time was a little over 3600*l.*

On December 29, 1905, at a meeting of the board a consent was produced, which was signed by all the members of the company, that an extraordinary general meeting of the company should be convened for January 1, 1906, for the purpose of passing an extraordinary resolution for the voluntary winding-up of the company and the appointment of a liquidator. (1) On the board's instructions the meeting was convened for January 1, 1906, and on that day the extraordinary resolution was passed.

In March, 1906, the liquidator took out an originating summons in the winding up, asking for—(1.) a declaration that the creation and issue to William Jackson of the debenture dated December 15, 1905, was an undue and fraudulent preference of William Jackson over the other creditors of the company under s. 164 of the Companies Act, 1862, and that the debenture was invalid accordingly; (2.) such consequential relief on the footing of the afore-said declaration as the circumstances of the case might require; (3.) that the respondent might be ordered to pay the costs of the application, or that such further or other order might be made in the premises as to the Court should seem fit.

(1) Clause 24 of the articles of association provided that "with the consent in writing of all the members for the time being a general meeting may be convened on a shorter notice than seven days and in any manner they think fit."

The summons was adjourned into Court and heard by BUCKLEY J.
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Buckmaster, K.C., and *R. J. Parker*, for the liquidator. It may be contended that in effect this was merely a case of giving security for an overdraft, but if that had been the real transaction the security would have been registered at the outset. There was no registered security until the company was on the verge of winding-up. An agreement to give a charge, followed by a charge only executed within the period of three months before winding-up, is, having regard to s. 48 of the Bankruptcy Act, 1883, an "undue or fraudulent preference" within the meaning of s. 164 of the Companies Act, 1862.

The case of a security given by a company which requires for its validity registration under s. 14 of the Companies Act, 1900, stands on precisely the same footing as the case of a bill of sale to secure a loan to a private individual.

In *Ex parte Fisher* (1) Mellish L.J. points out that when the giving of a bill of sale is purposely postponed until a trader is insolvent, in order to prevent the destruction of his credit which would result in registration, the postponement is evidence of an intention to commit an actual fraud against the general creditors. That case was followed by Bacon, Chief Judge in Bankruptcy, in *In re Gibson*. (2)

In *Ex parte Kilner* (3) an agreement was made in November, 1877, that in consideration of a present advance the borrower would, "if required" by the lender, who was one of two executors, give a bill of sale to secure the amount of the advance. The lender died in September, 1878, without having asked for a bill of sale, and on his death the co-executor asked for and obtained the bill of sale within a month of the borrower's bankruptcy. The Court of Appeal held that the principle of *Ex parte Fisher* (1) applied.

In *Ex parte Hauxwell* (4) it was held by the Court of Appeal that a parol agreement to give a bill of sale did not require registration, and that the bill of sale given in pursuance of it

(1) L. R. 7 Ch. 636, 644.

(3) 13 Ch. D. 245.

(2) 8 Ch. D. 280.

(4) 23 Ch. D. 626.

BUCKLEY was not void because the agreement was not registered; but that was because the transaction was found to be an honest one. The principle of *Ex parte Fisher* (1) and *Ex parte Kilner* (2) was fully recognized by the Court. The real ground of the decision was that there was an agreement to give at once a bill of sale, and that the postponement of its execution was no part of the agreement.

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Sect. 14 of the Companies Act, 1900, requires registration of such a security as the respondent obtained. The agreement to give him a charge might give him a charge in equity, but if so it required registration. As it was not registered he had in fact no agreement which he could enforce, and, although there was an obligation to him, he was, being a director, incapable of putting such pressure on the company as would prevent the giving of the debenture from being a fraudulent preference.

Eve, K.C., and *T. P. Perks*, for the respondent William Jackson. The object of the liquidator's summons is to establish that there was a fraudulent preference, but the cases relied on have no reference to fraudulent preference, and only deal with the question whether an act of bankruptcy had been committed. That is not the point here. Sect. 164 of the Companies Act, 1862, says that certain things done by a company shall be invalid as fraudulent preferences if they would be fraudulent preferences by an individual trader, and therefore s. 48 of the Bankruptcy Act, 1883, and the decisions on it have to be examined to see whether what is complained of is a fraudulent preference.

No doubt the burden lies on the respondent to shew that there was an antecedent agreement to give the security which was ultimately obtained and that the transaction was bona fide. When that burden has been discharged it lies on the liquidator to shew that there is an undue preference. That there was an antecedent agreement is conceded, and the bona fides of the transaction will be readily inferred by the Court. From the beginning it has not been suggested that the company was not an honest trading company, and the facts that the respondent had a large interest in and control of it are immaterial. His

(1) L. R. 7 Ch. 636, 644.

(2) 13 Ch. D. 245.

agreements with the company were for valuable consideration, inasmuch as he had to deposit his own securities to cover the overdrafts. The agreements themselves gave him a good equitable charge.

[BUCKLEY J. As against the mortgagor.]

A winding-up within three months of the time when the security was actually given does not of itself invalidate the security. Nor does non-registration of the original agreements. Where security for an overdraft was to be given to bankers "at any time thereafter if they should desire it," and the security, in the shape of a builder's certificate of a ship, was only given a few days before liquidation, it was held that there was no fraudulent preference: *Ex parte Hodgkin*. (1) In *Ex parte King* (2) it was held that a bill of sale given, in pursuance of a previous agreement, a month before bankruptcy was valid.

[BUCKLEY J. That is only a decision on a question of fact.]

The case was approved by the Privy Council in *Administrator-General of Jamaica v. Lascelles, De Mercado & Co.* (3) The real question is whether there was an intention to prefer the creditor, and the onus of shewing that intention is on those who allege it: *Ex parte Griffith* (4); *Sharp v. Jackson*. (5) In the last case Lord Halsbury L.C. (6) approves what Lord Esher M.R. said in the Court below, viz., that "the question whether there has been a fraudulent preference depends, not upon the mere fact that there has been a preference, but also on the state of mind of the person who made it. It must be shewn not only that he has preferred a creditor, but that he has fraudulently done so"; and it was held that a preference was not fraudulent where the debtor was "not actuated by any feeling of bounty towards those in whose favour the deed was made, but was doing what he did for his own benefit."

[BUCKLEY J. To shew it is not fraudulent it must appear that what was done was to protect himself, and not to benefit others. To shew it is fraudulent you must find that it was

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(1) (1875) L. R. 20 Eq. 746.

(2) (1876) 2 Ch. D. 256.

(3) [1894] A. C. 135.

(4) (1883) 23 Ch. D. 69.

(5) [1899] A. C. 419.

(6) *Ibid.* 421.

BUCKLEY J. with intent to prefer, or perhaps that what was done resulted in preference.]

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Morris v. Morris (1) shews that *Ex parte Fisher* (2) and *Ex parte Kilner* (3) are not strictly in point. This is, in fact, the case of a person taking a good security as between himself and the company, but forbearing, for his own benefit, to complete the security by registration. Early in 1905 the company was justified in believing that it had a successful future, and the contractual obligation which it entered into goes to rebut the presumption of fraud.

[They also referred to *Halliday v. Holgate* (4) and *Ex parte Mackenzie*. (5)]

Buckmaster, K.C., in reply, referred to Williams on Bankruptcy, 8th ed. pp. 9, 10.

BUCKLEY J. This company is in voluntary liquidation under an extraordinary resolution passed on January 1, 1906. By the terms of the resolution the company declared itself insolvent; it is insolvent, moreover, in the sense that its assets are not sufficient for the payment of its creditors. There is a deficiency, I am told, of something over 2500*l.* for creditors.

The application before me is a summons by the liquidator for a declaration that a certain debenture of the company which was executed on December 15, 1905—that is to say, a little more than a fortnight before the winding-up commenced—was a fraudulent preference within s. 164 of the Companies Act, 1862. The debenture-holder is one William Jackson. The debenture is to secure the sum of 3600*l.*

The company was incorporated on March 2, 1904, by the name of “Jackson & Bassford, Limited”: its memorandum of association was signed by five Jacksons and two Bassfords, the two Bassfords being, I take it, Mr. Bassford and his wife, and the Jacksons being William Jackson, the respondent to the summons, his wife, and three of his children. By the articles of association three directors were appointed—viz., the respondent

(1) [1895] A. C. 625.

(3) 13 Ch. D. 245.

(2) L. R. 7 Ch. 636.

(4) (1867) 17 L. T. 18.

(5) (1873) 42 L. J. (Bk.) 25.

William Jackson, Arthur Jackson, his son, and Frederick James Bassford—and William Jackson was to be what is called “permanent director.”

The capital of the company was in shares of 1*l.* each; it issued 807 shares and no more. These shares were held as to 501 by William Jackson, as to 151 by Bassford, as to 151 by Arthur Jackson, and four persons, namely, the other signatories to the memorandum of association, held the remaining four shares. The substance of this is that William Jackson was not only a member of the board, but also the permanent director and the holder of the great bulk of the shares.

This company, with its small subscribed capital of 807*l.*, carried on business to such an extent that its turnover in 1904 was 12,513*l.*, and in 1905 was 20,708*l.* It is obvious that transactions of this volume could not have been undertaken without money being obtained somehow. The way in which the money was obtained was this. The company had an account with the Bradford and District Bank, and the bank was willing to allow the company an overdraft upon the terms that William Jackson guaranteed the overdraft. The overdraft first arranged for was 2500*l.* In December, 1904, William Jackson wrote a letter to the company saying that he was prepared to guarantee if he got security, and on December 8, 1904, at a board meeting at which William Jackson, Bassford, and Arthur Jackson were present, a resolution was passed that “in consideration of William Jackson arranging such overdraft as referred to in the last resolution, the company shall, whenever called upon by him to do so, give him full and sufficient security over its assets by means of debentures or other charge in respect of the amount for which he shall render himself liable.” The company thus obtained an overdraft from the bank up to 2500*l.*, and the company drew upon its account and exhausted that overdraft.

In February, 1905, there was a proposal to enlarge the overdraft by 1500*l.*—to the sum of 4000*l.*—and another letter and resolution ensued, which I need not read, as in substance they are the same as the former letter and resolution. The result was that the bank allowed an overdraft for 4000*l.*, and William Jackson deposited securities of his own with the bank by way of security

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for the overdraft, and obtained from the company the resolution that he should have security whenever he called for it. He undoubtedly gave value for the agreement to give him security, for he guaranteed the bank and gave security to the bank. William Jackson himself was a leather merchant who sold goods to the company to a large extent. The company owed him large sums of money from time to time; and he benefited from the overdraft in this way—that he received payment for the goods which he sold to the company. Matters went on until December 8, 1905. On that day he wrote a letter calling for the security which the company had agreed to give him, and on the same day there was a board meeting at which his letter demanding security was read, and it was resolved “that the solicitors to the company be and they are hereby instructed to prepare and submit for execution by the company a debenture on the company’s assets in favour of Mr. William Jackson to secure the amount for which he is liable to the bank.” On December 15 this debenture, which was for 3600*l.*, was given. The question is whether William Jackson can hold that security.

In *Ex parte Fisher* (1) Mellish L.J. says, in a passage which has often been quoted since: “Although we do not dispute the rule that where a sum of money is advanced on the faith of a promise that a bill of sale shall be given, such sum is to be treated as a present advance on the security of a bill of sale, we do not think this rule will protect transactions where the giving of the bill of sale is purposely postponed until the trader is in a state of insolvency, in order to prevent the destruction of his credit, which would result from registering a bill of sale. We think that such a postponement is evidence of an intention to commit an actual fraud against the general creditors.” I think that principle is applicable to the present case. Under s. 14 of the Companies Act, 1900, provision is made for the registration of mortgages or charges which are given by limited companies. The object of that legislation is that those who are minded to deal with limited companies shall be able, by searching a certain register, to find whether the company has incumbered its property or not. An agreement to give security may be either one of two things. It

(1) L. R. 7 Ch. 636, 644.

may be so expressed as to create a present equitable right to a security. If it does that, then it would seem to me that it must be registered under s. 14 of the Act of 1900, otherwise it is void as against the liquidator and any creditor of the company. Or it may be so expressed as to be merely an agreement that in some future circumstances a security shall in the future be created. In that latter case, the agreement not creating a present security will not require registration. But if an agreement of the latter kind were allowed to be employed for the purpose of excluding the doctrine of fraudulent preference, it is obvious that that would be a means of enabling the company, in point of fact, to give a right to incumbrances upon its property which would be outside s. 14 as not requiring registration, and yet would escape the doctrine of fraudulent preference by reason of the pre-existing promise.

Looking back to the judgment of Mellish L.J., I read this again: "Although we do not dispute the rule that where a sum of money is advanced on the faith of a promise that a bill of sale shall be given, such sum is to be treated as a present advance on the security of a bill of sale." If those words apply to this case, then registration would, as it seems to me, be necessary under s. 14 of the Act of 1900. If that be not so, then, reading on to the words "general creditors" at the end of the passage, the language is, I think, applicable to exactly such a state of things as the present. If a creditor of a corporation takes a promise to give a security in the future and holds it over so as not to injure the credit of his debtor, in order to escape the necessity of registering under s. 14 of the Act of 1900 and thus disclosing to the creditors the fact that there is an incumbrance, it seems to me that is evidence of an intention to commit an actual fraud upon the general creditors from whom that information is withheld.

Ex parte Fisher (1) has been followed in several cases, as to which I need only say a word. In *Ex parte Gibson* (2), which was before Chief Judge Bacon, I do not find any new principle. He was simply there determining questions of fact and applying *Ex parte Fisher* (1) to the facts found. The promise was to "give a bill of sale whenever you

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(1) L. R. 7 Ch. 636.

(2) 8 Ch. D. 230, 233, 234.

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require it"; and the Chief Judge says: "It would be directly repugnant to all principles of bankruptcy law to say that if a man contracts a debt in 1873, and says to the lender, I will give you as security a bill of sale, if you like, and the lender says, I will not take it unless you are pressed, and the lender dies, and then the executor comes and says, I must have security for this debt, and the bill of sale is accordingly given, that is a valid bill of sale." He says you must "see if a just inference can be drawn from the facts that the intention was to give one of the creditors an advantage over the others by giving a bill of sale." He comes to the conclusion, as a matter of fact, that the lender says, "I will not take your bill of sale now, because I must register it, and if I register it your credit will be destroyed."

Ex parte Kilner (1) emphasizes the rule laid down in *Ex parte Fisher* (2), and decides this, that an agreement to give security if and when required does not necessarily leave the person who takes the security open to have it impeached as a fraudulent preference, but that the onus is on him to prove that he postponed taking it for some valid reason—valid for his own purposes—and that it was not postponed in order to protect the grantor's credit, or, in other words, to enable the grantor to obtain credit from other persons in ignorance that he had given a promise which he might be called upon to perform.

In *Ex parte Hauxwell* (3) the bill of sale was upheld because the Court found there was an agreement for immediate execution of the bill of sale, and that the creditor tried to get it and did not abstain from getting it in order to bolster up the credit of the grantor.

That being the law which I have to apply, the other material facts of the present case are these: The board of this company was so constituted as to leave no room for doubt that William Jackson could have had his debenture at any moment he chose to ask for it. He, his friend Bassford, and his son were the three directors. Directly he asked for the debenture he got it, and he could have had it earlier if he

(1) 13 Ch. D. 245.

(2) L. R. 7 Ch. 636.

(3) 23 Ch. D. 626.

had expressed the wish for it. How does he discharge himself of the onus, which, according to *Ex parte Kilner* (1), rests upon him, of proving that the postponement of taking the debenture was bona fide? It seems to me that he does not discharge it at all. The facts point to this, that, relying upon the possession of an agreement (undisclosed, and of course not registered under s. 14 of the Act of 1900), he went on incurring debts on the part of the company, relying on the fact that he could, at any subsequent time when it suited him, on the eve of insolvency, come in and say to the company, "Now I call upon you to give effect to your antecedent promise and to give me the security for the debt which you owed to me long ago." To allow that would be in substance to repeal s. 14 of the Act of 1900. If such a doctrine were to be upheld, it would only be necessary for persons to hold undisclosed agreements to give security in the future; the creditors would never know of them, and at the last moment, on the eve of insolvency, the lender could come down and ask for, obtain and maintain the security. It seems to me that in the present case the promise—which was certainly made and, I agree, for value—was a promise to which effect could not legally be given by calling for performance at a time when, in the absence of the promise, the security would have been a fraudulent preference. I hold, therefore, that the debenture was a fraudulent preference, and it must be treated accordingly.

The respondent must pay the costs of the application.

Solicitors for applicant: *Burton, Yeates & Hart, for Tyrer, Kenion, Tyrer & Simpson, Liverpool.*

Solicitors for respondent: *Vincent & Vincent, for Peckover & Scriven, Leeds.*

(1) 13 Ch. D. 245.

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June 13, 27.

In re SLATER.
SLATER *v.* SLATER.

[1905 S. 3973.]

Will—Construction—Bequest—“Money invested in” Lambeth Waterworks Company—Metropolis Water Act, 1902 (2 Edw. 7, c. 41)—Transfer of Undertaking to Water Board—Compensation—Metropolitan Water Stock—Ademption—Wills Act, 1837 (1 Vict. c. 26), s. 24.

A testator bequeathed “the interest arising from money invested in” (inter alia) the “Lambeth Waterworks Company” to a legatee for life and then over. Between the dates of his will and death the undertaking of the Lambeth Waterworks Company was acquired by the Water Board under the provisions of the Metropolis Water Act, 1902, and a sum of Metropolitan Water B stock had been issued to the testator as compensation in respect of the ordinary stock which at the date of his will he held in the Lambeth Waterworks Company:—

Held, that the Metropolitan Water B stock did not pass under the bequest.

The application of s. 24 of the Wills Act to specific bequests, discussed.

Goodlad v. Burnett, (1855) 1 K. & J. 341, applied.

ADJOURNED SUMMONS.

By his will dated February 8, 1904, the testator, James Archibald Slater appointed the plaintiffs Jane Slater and M. M. Brophy his executors, and made (inter alia) the following bequest:—“To Catherine Pontin Slater I bequeath the interest during her life arising from money invested in the following viz. (1.) Consols (2.) West Surrey Water Company (3.) Anglo Romano Gas Company (4.) New Jersey Railway Bonds (5.) Lambeth Water Works Company (6.) William Owen Limited (7.) Bond for 1000*l.* sterling on Meggatland House and Grounds Slateford Midlothian At the demise of Catherine Pontin Slater the income arising from these properties to be divided amongst my sisters in equal shares and at the death of the last survivor one half to be divided” between the defendants J. F. Curror and J. L. M. Curror, and the other half to be divided equally amongst the plaintiff M. M. Brophy’s children, who were also his residuary legatees.

The testator died on May 15, 1905.

At the date of his will the testator had standing in his name in the books of the Lambeth Waterworks Company 190*l.* Lambeth Waterworks Company 3*l.* per cent. debenture stock, 475*l.* Lambeth Waterworks Company 4*l.* per cent. debenture stock, and 1075*l.* Lambeth Waterworks 10*l.* per cent. stock.

By the Metropolis Water Act, 1902, it was provided that as from June 24, 1904, the undertaking of each of the metropolitan water companies, including the undertaking of "The Company of Proprietors of Lambeth Waterworks" (hereinafter called "the Lambeth Waterworks Company"), should be transferred to and vested in the Water Board created by that Act upon the terms and conditions therein mentioned. On or about August 2, 1904, the directors of the Lambeth Waterworks Company formed a scheme under the Fourth Schedule of the said Act for the application and distribution of the compensation awarded to the company under that Act; and under that scheme there was, on December 27, 1904, issued to the testator in respect of his holding of 1075*l.* Lambeth Waterworks Company 10*l.* per cent. stock the nominal amount of 3739*l.* 13*s.* 2*d.* Metropolitan Water B stock. On December 29, 1904, the testator purchased a further sum of 2102*l.* 8*s.* 11*d.* Metropolitan Water B stock.

At the date of his death the testator was possessed of the above-mentioned sums of 190*l.* and 475*l.* Lambeth Waterworks debenture stock, and 3739*l.* 13*s.* 2*d.* and 2102*l.* 8*s.* 11*d.* Metropolitan Water B stock.

The plaintiffs took out this summons for the determination (inter alia) of the question whether the bequest above set out comprised the sum of 3739*l.* 13*s.* 2*d.* Metropolitan Water B stock above mentioned, or whether the same formed part of his residuary estate.

Vernon, for the plaintiffs.

Badcock, *K.C.*, and *Methold*, for the defendant C. P. Slater. We submit that the Metropolitan Water B stock passed under this bequest. The testator intended all the property that he had in the Lambeth Waterworks Company to pass. The stock can be traced, and there is no ademption. There is a peculiar

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JOYCE J. omission from the Metropolis Water Act, 1902, for although by
 1906 s. 7 the Act provides for the substitution of water stock for irre-
 SLATER, deemable debenture stock, and saves all rights and trusts and
In re. (inter alia) testamentary dispositions in respect thereof, no
 SLATER v. similar provision is inserted in respect of other kinds of
 SLATER. waterworks stock.

This is a bequest of the interest of moneys invested in various stocks, and, construed according to the more liberal construction adopted by Fry J. in *Morgan v. Thomas* (1), is really a bequest of moneys, in whatever form they may exist at the testator's death, if they are distinguishable from the rest of his estate. It is a question of description, of the measure of the gift, and ought not to alter the rights of parties under the will. The legacy is specific, and there is no difficulty in tracing the money: *Moore v. Moore*. (2) In *Le Grice v. Finch* (3) there was a bequest of the 500l. "now out upon mortgage," the mortgage was called in and the money applied to different purposes, and it was held that there was no ademption. That decision is in agreement with the remarks of Fry J. in *Morgan v. Thomas* (1), and covers the present case.

[JOYCE J. *Le Grice v. Finch* (3) was previous to s. 24 of the Wills Act.]

The Wills Act makes no difference. It does not alter the construction of the will, or the description of the legacy. There was money which by its state of investment satisfied the bequest at the date of the will, and that money can be traced all through.

[JOYCE J. referred to the remarks of Sir G. Jessel M.R. in *Sidney v. Sidney*. (4)]

Younger, K.C., and *Newton*, for the residuary legatees. This is a specific legacy, and, with regard to the particular stock in question, when the stock ceased to exist the legacy was pro tanto adeemed. In *Harrison v. Jackson* (5), a case very similar to the present, Sir G. Jessel M.R. held that the legacy was adeemed, and criticized adversely Sir W. Grant's judgment in *Le Grice v. Finch*. (3)

(1) (1877) 6 Ch. D. 176, 179.

(3) (1817) 3 Mer. 50.

(2) (1860) 29 Beav. 496.

(4) (1873) L. R. 17 Eq. 65, 68.

(5) (1877) 7 Ch. D. 339.

In *McClellan v. Clark* (1) a bequest of 500*l.*, “being part of” certain stock previously mentioned in the will, was held adeemed, the testatrix not being possessed of any such stock at the time of her death. Again, in *In re Robe* (2), following *Harrison v. Jackson* (3) and *McClellan v. Clark* (1), and not following *Le Grice v. Finch* (4), the bequest of a sum of 4000*l.* “at present” secured by a certain mortgage which was paid off before the testator’s death was held a specific legacy and adeemed. That was a stronger case than this.

The testator distinctly refers to these investments, and it is apparent on the face of the will that he intended to dispose of investments he then held. This is a specific legacy within the description given by Kay J. in *In re Gray*. (5) In *Kermode v. Macdonald* (6) “300*l.* or thereabouts invested in the General Steam Navigation Company” was held to be specific and to fail. In this case it is “money invested in” the stocks mentioned, and it is impossible to say that that is not specific.

Badcock, K.C., in reply.

Cur. adv. vult.

June 27. JOYCE J., after stating the bequest, continued:—The question I have to determine is the effect of this gift in reference to money invested in the Lambeth Waterworks Company, the fact being that 1075*l.* Lambeth Waterworks 10*l.* per cent. stock belonging to the testator at the date of his will was subsequently during the testator’s lifetime converted into Metropolitan Water B stock. Both parties assert that the bequest is specific, and, certainly, it is not general or demonstrative, but the parties differ as to what is the particular thing of which the interest is given to Catherine Slater during her life, and a division of the corpus or capital of which was directed ultimately to be made as in the will mentioned. Some of the parties say that what the testator gave was his investments in or securities of the Lambeth Waterworks Company at the date of the will, and that as to such, or

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(1) (1884) 50 L. T. 616.

(2) (1889) 61 L. T. 497.

(3) 7 Ch. D. 339.

(4) 3 Mer. 50.

(5) (1887) 36 Ch. D. 205, 209.

(6) (1866) L. R. 1 Eq. 457; (1868)
L. R. 3 Ch. 584.

JOYCE J. such parts, of these as did not exist at his death there was an
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ademption, that is to say, a destruction or cesser of the existence of the thing the subject of the bequest. Other parties say that the thing given was the sum of money which, at the date of the will, was the amount or value of the testator's investments in the waterworks company, and as to such part of this as can be definitely and positively traced into another security or investment, properly so called, existing at the testator's death, they contend that the substituted security or investment passes by the bequest as well as what remained of the original investments in the Lambeth Waterworks Company.

In cases of the kind with which I have here to deal, as Sir G. Jessel M.R. says in *Sidney v. Sidney* (1), the first question to be considered is, What does the will mean? What is the testator describing or dealing with? or, as Lindley J. expresses it in *In re Bridle* (2), What is it that is bequeathed? This question being answered, the next inquiry will be, Where is that which was bequeathed? Did it or did it not exist at the testator's death? No doubt a bequest may be so worded as to shew that the subject-matter was to pass, whatever the condition with respect to investment, or otherwise, in which it might be found at the testator's death. And what is the proper effect to be given to the gift of a sum of money mentioned or described as invested in a particular way depends upon the question whether, according to the true construction of the will, it must be taken that the testator intended the legatee to have the money however it might be invested, or, in other words, whether the condition of the subject in reference to investment was the governing part of the description of the subject-matter of the bequest.

But s. 24 of the Wills Act in effect provides that descriptions of real or personal estate, the subject of gift, prima facie refer to and comprise the property answering to the description at the death of the testator. According to Jarman on Wills (5th ed. vol. i. p. 291), the application of this principle of construction to specific bequests is often attended with considerable difficulty. It has given rise to much litigation, and will probably give rise to more before its precise limits and effects are fully established.

(1) L. R. 17 Eq. 65, 69.

(2) (1879) 4 C. P. D. 336, 341.

If, however, according to the true construction of the will, the subject-matter of the bequest be not a specific sum, security, or investment, but be described in such a manner as to be generic—that is, to comprise a genus or class of objects—it may from its very nature be susceptible of increase or diminution during the testator's life. For instance, suppose a bequest by a testator of his Midland Railway stock, or of his shares in any particular company, if after the date of the will he acquires more of the railway stock or more of the shares, such additional stock or shares would now, since the Wills Act, by virtue of the 24th section thereof, pass under the bequest: *Trinder v. Trinder* (1); and if the subject of such a bequest be capable of increase by subsequent events in the lifetime of the testator, it must, I think, be capable of diminution in the same manner.

In *Goodlad v. Burnett* (2) the will of the testatrix contained a bequest of her new $3\frac{1}{4}$ per cent. annuities, and Wood V.-C. says: 'The testatrix here says, 'my New Three and a quarter per Cent. Annuities,' not using any words defining the particular amount,—not defining the stock in any way, except that which the Court, before the Wills Act, held to point to specific stock, which was at the time of making the will in the possession of the testator or testatrix. Even under the old law, it was not until after much consideration,—until several cases had been decided, by which the rule came to be conclusively settled, that the Court, looking at the state of the law as it then stood, arrived at the opinion that a bequest of 'my stock' or 'my share,' or any other similar property, described in those words, indicated an intention to pass the specific property only which the testator might have belonging to him, of the description in question, at the time of making his will. But then the Wills Act was passed, and that Act must have some sense given to it as regards personal estate. It is true, that, as regards general personal estate, there was no doubt before the passing of the Wills Act that the will spoke from the death, in most cases, but not in all; and it is precisely to the particular class of cases, of which the present is an instance, that the Wills Act would seem to have application. Before the Wills Act, the word 'my,' was not so conclusive for all purposes as to refer to

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(1) (1866) L. R. 1 Eq. 695.

(2) 1 K. & J. 341, 347.

JOYCE J. the state of things at the date of the will. The words, 'my children,' were held to mean, not the children of the testator at the date of making his will, but those at the time of his death. The Court, however, at last arrived at the conclusion to which I have already adverted, that when a testator referred to particular property, and bequeathed it by the description of all *his* property in any particular state of investment, he meant only so much of the property in that state of investment as he was possessed of at the date of his will. But now that the Wills Act has expressly enacted (and testators must be taken to know the Wills Act), that a will shall be construed, with reference to personal estate, to speak and take effect as if it had been executed immediately before the testator's death, unless a contrary intention appears by the will, it requires, in a case like the present, some more specific indication of such 'contrary intention' than the mere circumstance that the testatrix has described the stock by the words 'my Three-and-a-quarter per Cents.,'—words which, although a meaning could be given to them by reference to what was the state of things at the date of the will, have also a distinct meaning in reference to the state of things at the date of her death, and might have been left in the will for the very purpose of passing her property as it existed at the latter date, and because the testatrix knew, that, by the operation of the Wills Act, they would pass that property. When I refer to a particular thing, such as a ring or a horse, and bequeath it as 'my ring' or 'my horse,' it seems to me there might be considerable difficulty in saying that the 'contrary intention' to which the Act, in its 24th section refers, does not appear on the face of the will; but when a bequest is of that which is generic—of that which may be increased or diminished, then, I apprehend, the Wills Act requires something more on the face of the will for the purpose of indicating such 'contrary intention' than the mere circumstance that the subject of the bequest is designated by the pronoun '*my*.' I may disappoint the intention of the testatrix in this case, but in other cases the reverse might happen. It might happen that a person had left his will in a state like the present purposely, and because he believed, that, by the operation of the Wills Act, the words he had used would carry the

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whole property he might have at his death of the kind bequeathed ; and such a person would be equally disappointed that the Wills Act was not carried into effect.”

In the present case the bequest is not of any definite sum of money, nor even of “my Lambeth Waterworks stock,” and, upon consideration of the terms of the gift, I come to the conclusion that it is one of the class which Wood V.-C. had to deal with in the case which I have just mentioned, and which is referred to by Sir G. Jessel in *Sidney v. Sidney*. (1) Consequently as a matter of construction, and construction merely, this bequest, in my opinion, passed so much and no more money than the testator had at his death invested in the Lambeth Waterworks Company. The Metropolitan Water B stock, therefore, did not pass.

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Solicitors: *Maude & Tunnicliffe; Gery & Brooks.*

R. M.

PRICE v. CLINTON.

[1904 P. 1481.]

JOYCE J.
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July 5, 11.

Practice—Costs—Taxation—Numerous Actions against same Defendant—Different Plaintiffs—Entering Appearance—Scale Charge—Discretion of Taxing Master—Rules of the Supreme Court, 1883, Order LXV., rr. 8, 27, sub-r. 29; Appendix N, Nos. 59, 60.

Where numerous actions were brought by different plaintiffs against one defendant in respect of the same subject-matter, and the defendant's solicitor had entered appearance in all the actions at one and the same time:—

Held, that he was entitled on taxation to the full fee allowed by the rules in each action, and that the taxing Master had no jurisdiction under Order LXV., r. 27, sub-r. 29, to reduce the fee in respect of all the appearances subsequent to the first.

SUMMONS to review taxation.

The question in this case was whether, where numerous actions had been brought by different plaintiffs, all acting by the same solicitor, against one defendant in respect of the same subject-matter, the solicitor for the defendant was entitled to the full scale fee for taking certain steps in the actions as if each had

(1) L. R. 17 Eq. 65.

JOYCE J. been conducted by a different solicitor. The actions, seventeen in
 1906 number, were brought against the defendant in respect of alleged
 ~~~~~  
 PRICE      misrepresentations in the prospectus of the Standard Exploration  
 ~~~~~  
 v. Company, Limited, of which the defendant was a director.
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The actions were not consolidated, and there was no agreement that any one of them should be treated as a test case. One of the actions having been dismissed, all the others were discontinued by the plaintiffs. The defendant's solicitor in respect of each action lodged a separate bill of costs for taxation. These bills were separately taxed. In his answers to objections the taxing Master found that the actions, though not consolidated, were informally associated, and many of the proceedings in them were in fact taken at the same time. For instance, ten of the appearances were entered on the same day at the same time, and the remaining seven were entered on another day at the same time. The taxing Master found with regard to the charges for attending to enter appearance that the usual charge in one action is 6s. 8d., and 1s. additional for every defendant for whom appearance is entered after the first. He allowed, in respect of the ten appearances on the same day, 6s. 8d. for the first, and 2s. for each appearance after the first, making together 1l. 4s. 8d., which, being equally divided, gave 2s. 6d. for some and 2s. 5d. for the remainder; and he dealt with the other seven appearances in the same manner.

In thus dealing with the matter the taxing Master proceeded upon the ground that, inasmuch as the rules did not provide for such a case, he was bound, in the exercise of the discretion given to him by Order LXV., r. 27, sub-r. 29, to adapt the scale charges prescribed by the rules. (1) He referred, amongst other cases, to

(1) Order LXV., r. 8, provides that "solicitors shall be entitled to charge and be allowed the fees set forth in the column headed 'lower scale' in Appendix N, in all causes and matters, and no higher fees shall be allowed in any case, except such as are by this order otherwise provided for." By the schedule in Appendix N the following charges are fixed: "(59) Entering any appearance,

6s. 8d. (60) If entered at one time, for more than one person, for every defendant beyond the first, 1s." Rule 27, sub-r. 29, is as follows: "On every taxation the taxing Master shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party . . ."

McIver & Co. v. Tate Steamers, Ltd. (1), and *In re Burroughs, Wellcome & Co.'s Trade Marks.* (2) JOYCE J.

The applicant took out this summons contending that the taxing Master ought to have allowed the full fee of 6s. 8d. for the entering of each separate appearance.

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Ashton Cross, in support of the summons. The question is whether the taxing Master has any jurisdiction to cut down the minimum fee allowed by the scale. It is submitted that he has not. Order LXV., r. 8, is to some extent modified by r. 27, sub-r. 29, of the same order; but that is an enlarging rule, and has never been construed as entitling the taxing Master to cut down the scale charge.

For this purpose each action must be treated as separate and distinct, and the solicitor is entitled to the full scale fee for entering appearance in each action.

The taxing Master in his answers to the objections says that he has adapted Appendix N to meet the case. He has no power to do so: *Oppenshaw v. Whitehead* (3); *Grieb's Case* (4); *In re Ermen.* (5)

W. Higgins, for the respondent. Order LXV., r. 27, sub-r. 29, must be read in conjunction with r. 8 and with Appendix N. Where Appendix N is not clear and does not fix a fee, then r. 27, sub-r. 29, comes in. Where, as here, the case is not covered by the rules the taxing Master has a discretion. He has rightly exercised his discretion by giving the solicitor a sufficient remuneration for the work done.

Cur. adv. vult.

July 11. JOYCE J. I have looked into this matter since the hearing, and have made some little inquiry on the subject. It is a case in which one person is defendant in a large number of actions, which are properly separate actions, in respect of misrepresentation in the prospectus of a company. All the actions were dismissed with costs, or rather one was dismissed and the rest were discontinued. The question now arises, on the taxation

(1) [1902] 2 K. B. 184.

(3) (1854) 9 Ex. 384.

(2) (1904) 22 Rep. Pat. Cas. 164.

(4) (1890) 45 Ch. D. 606.

(5) [1903] 2 Ch. 156.

JOYCE J. of the defendant's bills of costs in those actions, whether the
1906 solicitor who appeared for the defendant is entitled to certain
PRICE allowances as if the defences in the several actions had been
v. conducted by separate solicitors. Rule 8 of Order LXV. provides
CLINTON. that solicitors shall be entitled to charge and be allowed the fees
set forth in Appendix N; and Appendix N prescribes the
amounts to be allowed. Now what the taxing Master has done
is this: He considered that, notwithstanding Appendix N, he
had a discretion as to the amount to be allowed, and that by
virtue of Order LXV., r. 27, sub-r. 29, and under the peculiar
circumstances of this case, he was entitled to allow, and did
allow, a smaller sum than the amount specified in the appendix.
But it appears to me that whether this sub-rule enables the
taxing Master to allow more than the specified amount, or
whatever the authority may be which it confers upon him,
it does not entitle him to allow a smaller sum than the amount
specified in the appendix. All the items in dispute were not
gone into on the hearing of the summons, the arguments
being mainly addressed to the charge for entering appear-
ance. Now, according to r. 8 and Appendix N, the sum to be
allowed for entering any appearance is 6s. 8d.; and if entered at
one time for more than one person, for every defendant beyond
the first sum of 1s. There is no provision in the rules or
appendix for such a case as the present, where there are several
actions against the same defendant, and all the plaintiffs are
represented by the same solicitor, nor is there anything at all
like it. If any special provision is to be made to meet a case
like the present, where there are many actions, that provision
must be made by a new rule or an alteration of the appendix.
In the meantime, as the appendix stands, 6s. 8d. is to be allowed
for any appearance. Therefore, in my opinion, 6s. 8d. must be
allowed for each appearance in this case. The matter must go
back to the taxing Master to review the taxation.

Solicitor for summons: *Gilbert Robins.*

Solicitors for respondent: *Richardson & Co.*

G. A. S.

DAVIS *v.* BENJAMIN.

[1906 D. 973]

SWINFEN
EADY J.

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July 13.

*Copyright — Illustrated Catalogue — “Book” — “Sheet of Letterpress” —
Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 2.*

A trade advertisement consisting of a sheet of illustrations, with no letters except the name of the advertising firm and the names and prices of the articles, is a “sheet of letterpress,” and therefore a “book,” within the meaning of the Copyright Act, 1842, s. 2, and original illustrations on such a sheet would be entitled to protection even in a case where there was no original letterpress.

THIS was an action for an injunction to restrain the infringement of the plaintiff's copyright in a furniture catalogue or price sheet registered under the Copyright Act, 1842 (5 & 6 Vict. c. 45).

The price sheet in question was printed on one side of a large sheet of paper. It was headed with the plaintiff's name and the addresses of his show-room and factory. Beneath this was printed “Special Sale Lines,” and the rest of the sheet consisted of illustrations of chairs, couches, and similar articles of furniture; six illustrations of chairs were surrounded with a black line, and underneath was printed, “Special Line in Drawing Room Chairs. In Silk Tapestry or Velours, 17s. 6d.” In the case of the other illustrations a number and a price was printed below each article, and sometimes the name, e.g. “patent box settee,” was added. At the bottom of the sheet was printed “Patterns of coverings on application.” This sheet had been registered as a book, and the heading, consisting of the plaintiff's name and address and the words “Special Sale Lines,” had been registered as its title. The illustrations had been drawn and engraved for the plaintiff.

The defendant had circulated a sheet of similar character, on which it was admitted that a draftsman employed by the defendant had copied some of the plaintiff's illustrations, though it was denied that the defendant had directed him to do so.

Sect. 2 of the Copyright Act, 1842, enacts that “the word ‘book’ shall be construed to mean and include every volume,

SWINFEN EADY J. part or division of a volume, pamphlet, sheet of letterpress . . . separately published."

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DAVIS v. BENJAMIN. *Scrutton, K.C., and D. Fulton, for the plaintiff. Maple & Co. v. Junior Army and Navy Stores* (1) shews that a trade catalogue can be the subject of copyright in respect of its illustrations. The catalogue there was in book form, but the definition of "book," in the Copyright Act, 1842, includes "sheet of letterpress," and this catalogue is a "sheet of letterpress." *Hildesheimer v. Dunn & Co.* (2) shews how widely the Courts have construed the term. It was there held to include a Christmas card.

Eve, K.C., and Jessel, for the defendant. Maple's Case (1) went to the extreme limit, but it does not cover this case. It only decided that Maple's catalogue was not the less a book because it consisted mainly of illustrations. The Master of the Rolls in that case explained *Bogue v. Houlston* (3) as drawing a distinction between engravings forming part of a book and engravings published separately. The latter, he said, could not be protected under this Act. This advertisement is not a book in the ordinary sense, and it cannot be brought in by the definition clause in the Act, for it is not a sheet of letterpress. The Act was passed "to afford greater encouragement to the production of literary works," as the preamble states, and some weight must be given to the preamble as indicating the class of works to be protected: see the judgments of Stirling L.J. in *Aflalo v. Lawrence & Bullen* (4), Davey L.J. in *Hollinrake v. Truswell* (5), and Lord Robertson in *Walter v. Lane*. (6) This sheet might be registered under the Fine Arts Copyright Acts, or perhaps as a design. It cannot be registered under an Act intended to protect literary copyright.

SWINFEN EADY J. In my opinion the plaintiff is entitled to an injunction. He has published an advertisement of furniture—chairs, sofas and the like—in the form of sheets of letterpress with the addition of illustrations. The defendant has copied, and

(1) (1882) 21 Ch. D. 369.

(2) (1891) 64 L. T. 452.

(3) (1852) 5 De G. & Sm. 267.

(4) [1903] 1 Ch. 318, 337.

(5) [1894] 3 Ch. 420, 428.

(6) [1900] A. C. 539, 562.

slavishly copied, those illustrations, and the fact that he has copied them is not denied. It is said that the plaintiff's advertisements are not sheets of letterpress, but sheets of drawings ; but in my view they are none the less sheets of letterpress because drawings are added. The statute protects copyright in books, and according to the interpretation clause a book is to be construed to include a sheet of letterpress. It was pointed out by Sir George Jessel M.R. and by Lindley L.J. in *Maple's Case* (1) that in *Bogue v. Houlston* (2), which was the earliest case of an illustrated book under the Act of 1842, there was no copyright in the letterpress, because it was the old story of Reynard the Fox, and the bill did not state that any other stories were bound up with it or make any claim to copyright. But, though there was no copyright in the letterpress, it was held that there was copyright in so much of the work as consisted of original prints because they were bound up in the book. Here there is a sheet of letterpress with original drawings illustrating it, and the sheet is a book within the statute. Although there may be no copyright in the letterpress, the original illustrations upon the sheet of letterpress or "book" are entitled to protection.

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Solicitors: *Kingsbury & Turner ; Arthur J. Benjamin.*

(1) 21 Ch. D. 369.

(2) 5 De G. & Sm. 267.

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PALMER v. GUADAGNI.

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[1906 P. 396]

July 18.

Practice—Pleading—Lost Grant—Date and Parties.

Under the modern practice, a lost grant may be pleaded without stating date or parties.

Hendy v. Stephenson, (1808) 10 East, 55, not followed.

APPLICATION for particulars.

By a release dated October 28, 1775, grounded on a lease for a year between the same parties, a piece of pasture ground called Nazeing Wood, Essex, was assured to the predecessors of the first seven plaintiffs in fee simple in trust for the benefit of the freeholders and copyholders of the manor of Nazeing as therein mentioned.

By a private Act of 1778 (18 Geo. 3, c. xv.) trustees were appointed to regulate the stocking of the said pasture and to keep the fences in repair for the benefit of the said freeholders and copyholders.

The second, third, fourth, eighth, and ninth plaintiffs were the present trustees under the Act.

The defendants Guadagni and Graham, the owner and tenant of adjoining property, had broken certain fences in the assertion of alleged private rights of way over Nazeing Wood.

The plaintiffs claimed a declaration and injunction.

The defendants relied on their alleged rights of way. They claimed them by common law and statutory prescription, and also pleaded—(paragraph 7) that by a deed (now lost) the owners in fee simple of Nazeing Wood granted the rights of way to Guadagni's predecessors in title; and (paragraph 8) that by a deed (now lost) the owners in fee simple of Nazeing Wood, with the concurrence of the freeholders and copyholders of the manor of Nazeing, granted the rights of way to Guadagni's predecessors in title.

The plaintiffs applied for certain further directions under the summons for directions, including (inter alia) a direction that

paragraphs 7 and 8 of the defence might be struck out as tending to delay or embarrass the fair trial of the action, or in the alternative that the defence might be amended in such manner as to shew whether the alleged lost deeds were respectively made prior or subsequent to the release of 1775, or prior or subsequent to the passing and coming into operation of the Act of 1778; and further, whether the alleged concurrence of the freeholders and copyholders mentioned in paragraph 8 was verbal or in writing, and the date of such concurrence and the names of the freeholders and copyholders so concurring.

Certain particulars were ordered in chambers, but this point was adjourned into court. It was agreed at the hearing that paragraph 8 should be read as meaning that the freeholders and copyholders joined in the deed.

Eve, K.C., and *Whitmore Richards*, for the plaintiffs. Defendants in trespass who justify under the lost grant of an easement must state the date and parties thereof: *Hendy v. Stephenson* (1), cited with approval by Lord Blackburn in *Dalton v. Angus* (2); *Yard v. Ford* (3); *Harris v. Jenkins* (4); *Spedding v. Fitzpatrick* (5); *Roberts v. James* (6); Gale on Easements, 7th ed. p. 562.

The plaintiffs are at any rate entitled to know whether the lost grants are alleged to have been made before or after the private Act, as in the latter case the plaintiffs might shew there was no one capable of making a grant: *Neaverson v. Peterborough Rural Council*. (7)

Micklem, K.C., and *Cordery*, for the defendants. The practice is stated in Bullen & Leake on Pleading, 6th ed. p. 950, as follows: "Before the Common Law Procedure Act, 1852, the particularity required in pleading made it necessary that the plea of lost grant should specify the particulars of the supposed deed as to the date and the names of the parties: see *Hendy v. Stephenson* (1); and the evidence must have been consistent with the particulars stated in the plea: *Blewett v. Tregonning*. (8)

(1) 10 East, 55.

(2) (1881) 6 App. Cas. 740, 813.

(3) (1670) 2 Wms. Saund. 172,

175a, 175b.

(4) (1882) 22 Ch. D. 481, 482.

(5) (1888) 38 Ch. D. 410.

(6) (1903) 89 L. T. 282.

(7) [1902] 1 Ch. 557.

(8) (1835) 3 Ad. & E. 554, 583, 585.

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The defence, however, is now often pleaded without mentioning the names of the supposed parties to the deed: see *Duke of Norfolk v. Arbuthnot* (1); and it would seem that the presumption of a grant may more properly be applied on a general statement that some former owner of the servient tenement granted the easement to some former owner of the dominant tenement, than on a limited allegation that such a grant was made by a particular named grantor to a particular named grantee."

This is the way lost grants were pleaded in *Haigh v. West* (2) and *Brown v. Dunstable Corporation*. (3) In *Haigh v. West* (2) Charles J. presumed that the lost grant had been enrolled, which he could not have done if the date had been given.

These authorities shew that the statement of date and parties is no longer necessary: Carson's Real Property Statutes, p. 25. It does not seem ever to have been necessary in equity: *Attorney-General v. Lord Hotham*. (4) In *Dalton v. Angus* (5) Lord Blackburn was only dealing with the point historically. We are quite ready to plead alternative grants, viz., one before the release of October 28th, 1775, one between that date and the private Act, and one after the Act.

Eve, K.C., in reply. In *Duke of Norfolk v. Arbuthnot* (1); *Haigh v. West* (2), and *Brown v. Dunstable Corporation* (3) no point was taken as to the form of pleading. In those cases user under the grant was pleaded. In the present case no such user is alleged. The defendants may of course plead alternative grants, but they will do so at their own risk as to costs: *Harris v. Jenkins*. (6)

SWINFEN EADY J. (after stating the facts). The plaintiffs in effect ask the defendants to state the dates of and parties to the lost deeds. The defendants admit that they cannot furnish these particulars. They say they are asking the Court to presume lost grants from facts to be proved at the trial, and there may be circumstances under which the claims by prescription would fail,

(1) (1879) 4 C. P. D. 290, 293;
(1880) 5 C. P. D. 390.

(2) [1893] 2 Q. B. 19; 62 L. J.
(Q.B.) 532.

(3) [1899] 2 Ch. 378, 380.

(4) (1823) T. & R. 209, 218.

(5) 6 App. Cas. 740, 813.

(6) 22 Ch. D. 481, 482.

but the facts would warrant the presumption of lost grants. It has often been said that a jury may presume the existence of a lost grant from acts of ownership or of enjoyment for twenty years and upwards consistent with the grant alleged in the plea. If I were to say that the defendants are bound to specify dates and parties on pain of having their plea struck out, I should in effect deprive them of the advantage of the plea.

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Formerly great particularity in pleading was required. That is so no longer, but the pleadings must contain fair and proper notice of the issues intended to be raised. This is essential to prevent the other party being taken by surprise. The defendants are entitled to plead lost grants prior to the release of 1775, between that date and the private Act of 1778, and subsequent to that Act. But if they desire to do this, they ought to say so definitely in their pleading, and these alternative pleas will be at their own risk as to costs. What they are really resisting is an order directing them to give dates and parties, an order that they could not comply with, and which would take away the whole benefit of their plea.

If they amend their defence so as to make it quite plain whether all or any of the lost grants they rely on were respectively made before the release of 1775, between that date and the private Act of 1778, or after that Act, they will have done all that the plaintiffs are entitled to require, and on their doing this there will be no further order on the summons beyond that made in chambers, except that the costs of the summons, including this adjournment, are to be costs in the action.

Solicitors : *Robbins, Billing & Co., for Jessopp & Gough, Waltham Abbey ; Burgess, Taylor & Tryon.*

G. R. A.

C. A.
 1906
 July 23.

NORTH EASTERN MARINE ENGINEERING COMPANY *v.*
 LEEDS FORGE COMPANY.

[1905 N. 807.]

Patent—Practice—Expired Patent—Action for Declaration of Invalidity—No consequential Relief—Discretion of Court—Rules of Supreme Court, 1883, Order xxv., r. 5—Mode of Procedure—Petition for Revocation—Fiat of Attorney-General—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), ss. 26, 32.

An action claiming merely a declaration of invalidity of letters patent already expired, where no legal right of the plaintiff has been infringed, is not maintainable.

Decision of Joyce J., [1906] 1 Ch. 324, affirmed.

The proper mode of procedure in a case of this kind is by a petition for revocation under s. 26 of the Patents, Designs, and Trade Marks Act, 1883.

The mere fact that a patent has expired is not of itself a sufficient reason for refusing a fiat for a petition for revocation.

APPEAL from a decision of Joyce J. (1)

The question for decision raised by this appeal was whether a person who has rendered himself liable to an action for infringement of patent is entitled to bring an action against the owner of the patent, under Order xxv., r. 5, for a declaration that the patent was invalid, and that the plaintiff had not infringed. The facts and the pleadings are fully set out in the report in the Court below, and the following summary is thought sufficient to make this report intelligible.

Prior to the year 1900 the Leeds Forge Company purchased certain letters patent for "An improved boiler flue," which expired by effluxion of time in May, 1903.

In March, 1900, the Leeds Forge Company commenced an action for infringement against Deighton's Patent Flue and Tube Company, in which they were eventually successful, and in which an inquiry as to damages was pending.

The present plaintiffs had purchased from the Deighton Company boiler flues identical in form with those that were the

(1) [1906] 1 Ch. 324.

subject of the action by the Leeds Forge Company, and in 1901, 1902, and June, 1904, letters were sent to the plaintiffs threatening them with an action in respect of the boiler flues so purchased. Actions had, in fact, been commenced by the Leeds Forge Company against the plaintiffs and other customers of the Deighton Company, which had been discontinued. As the Leeds Forge Company declined to give the plaintiffs an undertaking that they would not commence any further proceedings against them or any of their customers in respect of flues purchased from the Deighton Company, the plaintiffs, in June, 1905, commenced this action against the Leeds Forge Company, claiming declarations—(1.) that the letters patent in question were invalid at the date thereof, and were so continuously down to the date when the time for which they were granted expired; and (2.) that the plaintiffs had not infringed any legal rights of the defendants.

The action came on for argument upon the points of law involved in the pleadings and certain admissions before Joyce J., who decided that the action was not maintainable and dismissed it with costs, and at the same time intimated that the proper mode of procedure in a case like the present was by a petition for revocation under s. 26 of the Patents, Designs, and Trade Marks Act, 1883.

The plaintiffs appealed.

The appeal was heard on July 23.

Astbury, K.C., and *J. C. Graham*, for the appellants. The plaintiffs are entitled to be protected against any action which may be brought against them hereafter by the defendants in respect of breaches of the patent while it existed.

[COZENS-HARDY L.J. Is not a petition for revocation of the patent your proper course?]

After the judgment in the Court below application was made to the Attorney-General for leave to present a petition for revocation, but the Attorney-General refused his fiat. If the patent is not in existence there is nothing to revoke.

[COZENS-HARDY L.J. Personally I cannot see any difficulty in revoking letters patent that have expired.

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VAUGHAN WILLIAMS L.J. An order for revocation has the effect of rendering the letters patent void ab initio.]

If the plaintiffs cannot get the Attorney-General's fiat they must obtain protection in some other way, and an action of this kind is the remedy.

[ROMER L.J. If that is so, then a person could bring an action of this kind, claiming a declaration of invalidity, during the life of any patent; and if so, what is the use of providing for obtaining the Attorney-General's consent to a petition for revocation?]

The defendants have a judgment against the Deighton Company, and if revocation were granted the defendants might be deprived of the benefit of this judgment. A declaration as asked would not deprive the defendants of anything and would protect the plaintiffs.

[ROMER L.J. That judgment, being inter partes, would not be affected by an order for revocation of the patent, which enures for the benefit of the public generally.

VAUGHAN WILLIAMS L.J. Is not your real remedy in respect of threats?]

There is no remedy now under s. 32 of the Patents, Designs, and Trade Marks Act, 1883: *Challender v. Royle*. (1)

[VAUGHAN WILLIAMS L.J. referred to Wallace and Williamson on Patents, p. 515.]

A previous action is a sufficient answer to an action under s. 32: *J. B. Brooks & Co. v. Lycett's Saddle and Motor Accessories Co.* (2)

All the plaintiffs want is to be made safe for the future.

[ROMER L.J. You cannot make out that your right to bring an action of this kind accrued after the patent expired unless you also had a right before expiration of the patent. Declaratory judgments of this kind are in the discretion of the Court.]

If the Court takes so strong a view it is useless to go into any of the authorities, and it seems hopeless to apply again for the Attorney-General's fiat.

Bousfield, K.C., A. J. Walter, and Colefax, for the respondents were not called upon.

(1) (1887) 36 Ch. D. 425.

(2) (1904) 21 Rep. Pat. Cas. 651.

VAUGHAN WILLIAMS L.J. This appeal fails. Cozens-Hardy L.J. has made a suggestion to me which perhaps will meet the difficulties of the appellants to a certain extent. You would be glad, I suppose, of an expression of our opinion that the mere fact that the patent has expired is not a sufficient reason for refusing the fiat?

Astbury, K.C. That would be a great help to us.

ROMER L.J. We are of that opinion, but we do not mean to intimate that in this particular case the Attorney-General should grant his fiat.

VAUGHAN WILLIAMS L.J. You must quite understand that it must not be stated that we are of opinion that there ought to be a fiat in this case, but only that we are of opinion that the mere fact that a patent has expired is not of itself a sufficient reason for refusing a fiat. The appeal is dismissed with costs.

Solicitors: *J. H. & J. Y. Johnson, for Carter, Ramsden & Carter, Leeds; Vincent & Vincent, for Day & Yewdall, Leeds.*

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In re SPEARMAN SETTLED ESTATES.

1906

[1906 S. 2062.]

July 26.

Settled Land—Trustees—Compound Settlement—Appointment—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2, sub-ss. 1, 8.

Limited owners with joint absolute dominion over the estates comprised in a strict settlement (e.g., the life tenant and tenant in tail male in immediate remainder of estates unfettered by any charges or powers of charging) can resettle the estates as they please, and if they choose to keep the original settlement alive by a sufficient partial restoration of the subsisting uses, trusts and powers, they can appoint Settled Land Act trustees of the compound settlement constituted by the settlement and resettlement.

In re Spencer's Settled Estates, [1903] 1 Ch. 75, distinguished.

ORIGINATING SUMMONS.

By a marriage settlement dated October 30, 1878, and made between the husband of the first part, the wife of the second part, and trustees of the third part, the Spearman estates were conveyed to the trustees and their heirs to the use of the husband for life, with remainder to the use of his first and other sons successively, according to seniority, in tail male, with similar limitations in remainder to a second, third, and fourth life tenant and their respective sons in tail male, with remainders over. The settlement provided that the husband might substitute other estates of the value of 10,000*l.* for the Spearman estates or pay the trustees 10,000*l.* to be invested in land to be held on the same uses. He might then vary or revoke the uses of the Spearman estates. Express powers of leasing were given to life tenants in possession. An express power of appointing new trustees was given to the husband during his life. No charges for jointures, portions, or otherwise were created or authorized to be created, and there was no power of sale.

By a resettlement dated January 20, 1903, and made between the husband of the first part, his eldest son of the second part, and a grantee to uses of the third part, and enrolled as a disentailing assurance, the husband, so far as related to his life estate,

conveyed and confirmed, and the eldest son with the consent of the husband as protector conveyed and confirmed, the Spearman estates to the grantee in fee simple to hold the same unto the grantee in fee simple, freed and discharged from the eldest son's estate in tail male and all remainders and reversions thereon, to the use that the husband might raise 3700*l.* by mortgage at any rate of interest not exceeding 4*l.* per cent., and subject thereto to the use that the eldest son might receive a yearly rent-charge of 98*l.* during the joint lives of the husband and himself, and subject thereto to such uses as the husband and eldest son should by deed appoint, and subject thereto to such of the uses as were prior to and preceded the limitation to the fourth life tenant, and upon the trusts and with and subject to the powers, provisoes, agreements and declarations which under and by virtue of the settlement of 1878 or by reference thereto were subsisting and capable of taking effect immediately before the execution of this resettlement, so as to restore and confirm the same uses (being the uses prior to or preceding the limitation to the fourth life tenant) and trusts, powers, provisoes, agreements and declarations so far as those uses, trusts, powers, provisoes, agreements and declarations were by the resettlement expressed to be relimited, restored and confirmed, and subject thereto to the use of the husband's daughters as tenants in common in tail general with cross remainders, with remainder to the use of the husband, his heirs and assigns.

The power of substituting other estates of the value of 10,000*l.* or paying the trustees 10,000*l.* was expressly preserved. The substituted estates, or the 10,000*l.*, were to be subject to the 3700*l.* mortgage.

It was also agreed and declared that the trustees and trustee for the time being of the settlement of 1878 should be the trustees or trustee of the settlement constituted by the joint effect of that settlement and the resettlement for all the purposes of the Settled Land Acts, and, so long as there was only one trustee, capital money arising under the Acts or the settlement so constituted might be paid to him alone, and the powers conferred by the Acts might be exercised by one trustee only, and the provisions of the Acts applicable to trustees, including notices, should be

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satisfied though there might be only one trustee for the time being of that composite settlement in existence.

At the date of this resettlement Harding was the sole surviving trustee of the settlement of 1878. The 3700*l.* was duly raised by mortgage on March 4, 1903. The husband being desirous of selling the estates as life tenant, it became necessary to determine the following questions:—

(a) Did the existing settlement of the Spearman estates consist of a compound settlement constituted by the settlement and resettlement, or did it consist of the resettlement alone?

(b) If there was a compound settlement, was Harding effectually appointed a trustee of that compound settlement for the purposes of the Settled Land Acts?

(c) If there was no compound settlement, but the existing settlement was constituted by the resettlement alone, was Harding effectually appointed a trustee thereof for those purposes?

This summons was issued to determine these points, and for the appointment of trustees if necessary. It was thought desirable that there should be two trustees.

Herbert Robertson, for the life tenant. Although the resettlement purports to restore the uses of the settlement prior to the fourth life estate, those uses are really limited by the resettlement alone, the limitations being merely imported by reference to save copying. As there are no estates, jointures, portions or charges to keep the old settlement alive, it has completely come to an end. The resettlement is, therefore, the only existing settlement: *In re Mundy and Roper's Contract*. (1) The declaration that Harding should be a trustee of a non-existing compound settlement could not make him a trustee of the resettlement alone. New trustees must therefore be appointed by the Court. If the Court holds that there is a compound settlement, the declaration in the resettlement could not make Harding a trustee of that compound settlement for the purposes of the Settled Land Acts: *In re Spencer's Settled Estates*. (2) On either view, therefore, trustees must be appointed by the Court.

L. H. Elphinstone, for the trustee Harding. The old uses

(1) [1899] 1 Ch. 275,

(2) [1903] 1 Ch. 75,

prior to the fourth life estate are restored, so there is clearly a compound settlement, of which the husband is life tenant: *In re Cornwallis-West and Munro's Contract* (1), explained in *In re Lord Wimborne and Browne's Contract*. (2) The resettlement alone would not be a settlement within the Settled Land Act, 1882, s. 2, sub-s. 1, as it does not shew the life estate or other limitations by way of succession. It is necessary to look at the settlement for this purpose. The declaration that Harding should be a trustee of the compound settlement for the purposes of the Settled Land Acts was valid.

In *In re Spencer's Settled Estates* (3) the parties to the resettlement were not in complete control of the property, as there were paramount jointure and portions charges under the original settlement. In the present case the parties to the resettlement had absolute dominion over the property. They could have put an end to the original settlement altogether. Instead of doing that they have chosen to make a compound settlement, of which they declare the original settlement shall form part. As absolute owners they were entitled to create that compound settlement, and at the same time to declare who should be trustees thereof under s. 2, sub-s. 8. Harding is therefore a trustee of the compound settlement, and any new trustee of the original settlement appointed by the husband will ipso facto be a trustee of the compound settlement. Appointment by the Court is therefore unnecessary.

SWINFEN EADY J. (after stating the facts). It is quite clear on the construction of the resettlement that the old life estate under the original settlement has been restored, and under these circumstances effect must be given to the manifest intention of the parties to create or constitute a compound settlement.

The remaining question is whether Harding was effectually appointed a trustee of that compound settlement for the purposes of the Settled Land Acts.

Now in the present case, distinguishable in this respect from *In re Spencer's Settled Estates* (3), the life tenant and tenant in

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(1) [1903] 2 Ch. 150.

(2) [1904] 1 Ch. 537.

(3) [1903] 1 Ch. 75.

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tail male together were owners with absolute dominion over the settled estates. They were competent to dispose of them as they pleased, and therefore competent to appoint trustees for the purposes of the Settled Land Acts.

By the resettlement they declared that the trustees and trustee for the time being of the settlement of 1878 should be the trustees or trustee of the settlement constituted by the joint effect of that settlement and the resettlement for all the purposes of the Settled Land Acts. This declaration is valid and effectual.

I therefore hold that the husband is life tenant under the compound settlement, and that Harding, the sole existing trustee of the settlement of 1878, was effectually appointed a trustee of the compound settlement for the purposes of the Settled Land Acts.

Solicitors : *Frere, Cholmeley & Co.*

G. R. A.

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July 27, 31 ;
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In re WALLSEND BOROUGH COUNCIL AND NORTH-
UMBERLAND COUNTY COUNCIL.

[1905 W. 364.]

Schools—School Board—United District—Severance—Adjustment of Property and Liabilities—Education Act, 1902 (2 Edw. 7, c. 42), Sched. II., clauses 1, 22.

Where a united school district becomes severed under s. 1 of the Education Act, 1902, there is no automatic severance of property and liabilities according to areas under Sched. II., clause 1, but an adjustment under clause 22 is required.

Oldham Corporation v. Bank of England, [1904] 2 Ch. 716, distinguished.

SPECIAL CASE.

Prior to the passing of the Education Act, 1902, the school board of the united school district of Wallsend was the education authority under the Elementary Education Acts, 1870 and 1900, for a certain school district in the county of Northumberland,

comprising the municipal borough of Wallsend, with a population over 10,000, the urban district of Willington Quay, and the civil parish of Willington, hereinafter called Wallsend, Willington Quay, and Willington. There were three schools in Wallsend and three in Willington Quay. They had been erected by the school board for the united district by means of loans repayable by instalments over fixed periods of years. Unpaid balances of these loans were still outstanding. The loans, though charged on the united district, were allocated to the various schools in the books of the board.

On May 1, 1903, the Northumberland County Council under s. 1 of the Act became the local education authority of Willington Quay and Willington, and on June 1, 1903, the Wallsend Borough Council under the same section became the local education authority of Wallsend for the purpose of Part III. of the Act, these dates being the appointed days for the county and borough respectively.

On April 10, 1905, the Wallsend Borough Council, who considered that an adjustment of property and liabilities under Sched. II., clause 22, of the Act was required, obtained an order appointing an arbitrator under that clause, which incorporates s. 68 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), which in turn incorporates the Arbitration Act, 1889 (52 & 53 Vict. c. 49).

The arbitrator found as a fact that the rateable value of Wallsend exceeded the rateable value of Willington Quay and Willington combined, and that the part of the united school district comprised within Wallsend had contributed more under the periodical precepts of the school board to the repayment of the loans obtained for the purpose of erecting the schools in the united school district than Willington Quay and Willington combined.

At the hearing of the arbitration questions arose as to whether it was not necessary and whether the arbitrator ought not in his award to make an order vesting the property in the various school-houses in the education authority of the district in which the schools were now situate, and to make such adjustment between the two new authorities in respect of the sums paid in

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reduction of the said loans and in respect of the balances thereof still remaining unpaid as to him should appear just.

The Northumberland County Council, whilst admitting there was an interest requiring adjustment in so much of the buildings of each school as was used as a teacher's or caretaker's house, contended that by the operation of the Act the property in the various schools, together with the outstanding liabilities attaching thereto, became automatically vested in the local education authority of the district in which the schools were situate, and that no adjustment was necessary.

The Wallsend Borough Council, on the other hand, contended that the Act did not effect an automatic vesting of the property in those schools charged with the payment of the outstanding liabilities relating thereto, and that, as there was no provision in the Act for the division of those liabilities, an adjustment was necessary and should be made by the arbitrator.

Before making his award the arbitrator stated a case setting out the above facts and contentions, and asking for the opinion of the Court upon the following questions, viz. :—

(1.) Whether, by the operation of the Education Act, 1902, the several schools situate in the districts of which the Wallsend Borough Council and Northumberland County Council respectively became by the Act the local education authority became automatically vested in those councils, coupled with an obligation to discharge the outstanding liabilities relating to those schools so that no further adjustment as regards the property in those schools or the outstanding liabilities was required to be made.

(2.) Whether the Northumberland County Council, as representing Willington Quay and Willington, were liable to pay to the Wallsend Borough Council any sum by way of adjustment with respect to the moneys already paid in repayment of the loans and the balances thereof remaining unpaid, having regard to the fact that Wallsend had contributed more than Willington Quay and Willington to the repayment of the loans.

Forbes Lankester, K.C., and P. F. S. Stokes, for the Northumberland County Council. The schools in the respective areas were automatically vested by Sched. II., clause 1, of the

Education Act, 1902 (1), in the new authorities subject to their respective liabilities, and no transfer was required: *Oldham Corporation v. Bank of England*. (2) No adjustment is therefore required under clause 22, which merely settles the procedure to be adopted when adjustment is required. The Wallsend Borough Council cannot claim compensation in respect of their past higher contributions to the schools under the guise of adjustment: *Caterham Urban Council v. Godstone Rural Council*. (3) There is nothing unfair in the matter, as, although we have paid less than Wallsend in respect of past instalments, the Wallsend Borough Council can still send their children to our schools.

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Danckwerts, K.C., and *Gatey*, for the Wallsend Borough Council. In *Oldham Corporation v. Bank of England* (2) the whole property vested in the Oldham Borough Council. No question of severance arose, and no adjustment was required. In the present case there is a severance, and the arbitrator must adjust both the property and the liabilities: *In re Llanwonno School Board and Ystradfyfodwg School Board* (4); *Hebburn Urban Council v. Hedworth, Monkton and Jarrow United District School Board* (5); *In re Durham County Council and West Hartlepool County Borough*. (6) These schools were provided for the united district by loans charged on the united district under the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 57. There is nothing in the Act requiring a school provided for a district to be in that district. Clause 1 cannot, therefore, be read as partitioning the schools according to the areas in which

(1) The Education Act, 1902, provides as follows:—

SCHEDULE II.

Clause 1: “The property, powers, rights and liabilities (including any property, powers, rights and liabilities vested, conferred or arising under any local Act or any trust deed) of any school board or school attendance committee existing at the appointed day shall be transferred to the council exercising the powers of the school board.”

Clause 22: “Section 68 of the Local Government Act, 1894 (which relates to the adjustment of property and liabilities), shall apply with respect to any adjustment required for the purposes of this Act.”

- (2) [1904] 2 Ch. 716.
- (3) [1904] A. C. 171.
- (4) (1898) 14 Times L. R. 432; 62 J. P. 644.
- (5) [1904] W. N. 38; 90 L. T. 145.
- (6) [1906] 2 K. B. 186.

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they are situate. The arbitrator must partition them, and if necessary award a capital sum for owelty of partition. He has power to award a capital sum for adjustment under the Local Government Act, 1894, s. 68, and in doing this he ought to take the past unequal contributions into account. The property and liabilities will then vest retrospectively under clause 1 according to his award.

[SWINFEN EADY J. I cannot answer the second question on this application.]

The question is not properly framed, and cannot be answered as it stands. It had better be struck out.

Forbes Lankester, K.C., in reply, agreed to omit question 2.

Cur. adv. vult.

Aug. 2. SWINFEN EADY J. The Northumberland County Council contended that on May 1, 1903, being the appointed day, the three school-houses in the urban district of Willington Quay passed to and became absolutely vested in them, subject only to so much of the liabilities of the school board for the united district as represented the balance unpaid of moneys borrowed for the purpose of these three schools, and that no award of the arbitrator on this point and no adjustment was necessary. This argument was based upon the Education Act, 1902, Sched. II., clause 1. It was urged that the clause must be read as if it provided that the property of any school board for a united district, locally situated within any part of its district, shall be transferred to the council exercising the powers of the school board in the part of the district where the property is situate; and that the liability of the united school board in respect of the same property shall be transferred in like manner to the same council.

In my opinion clause 1 of the schedule cannot be read in this manner. Where the property and powers of the old board are not transferred to and vested in one new authority, but in two or more authorities, an adjustment of property and liabilities is required by the circumstances of the case; and clause 22 of the same schedule provides that s. 68 of the Local Government Act, 1894, shall apply with respect to the required adjustment. In

the present case there is not any “ council exercising the powers of the school board ” within the whole district of the old united school board, but the Northumberland County Council exercises those powers in a portion of the old district and the Wallsend Borough Council in the rest of the old district. Obviously it was not intended to vest the property in the two authorities either jointly or in undivided shares.

Although usually a public elementary school for a particular district is situate within the same district, this is not necessarily so ; in some cases it may be more convenient and less expensive to have a school a little way outside the limits of the district. If, therefore, the property is not to be vested in both authorities, and if the law does not require that a school-house for any district shall be locally situate within the same district, the only alternative is for the arbitrator, in adjusting the property and liabilities, to determine what portion of the property is to belong to each of the new education authorities. The decision of the Court of Appeal in *Oldham Corporation v. Bank of England* (1) does not apply to the present case, as there all the property of the old board vested in one authority, the Oldham Borough Council. There was no question of dividing it between two authorities.

No difficulty arises in the present case from the fact that the appointed day in the case of the Northumberland County Council is May 1, 1903, and in the case of the Wallsend Borough Council June 1, 1903. The vesting in the new authorities need not be on the same day. What did not vest in the Northumberland County Council on May 1 remained in the school board, and what remained in the school board vested in the Wallsend Borough Council on June 1. It is not inconsistent with this statutory vesting that what did in each case so vest should be determined subsequently.

It is common ground between the parties that some of the property and liabilities must be apportioned or otherwise adjusted between the two new authorities, such as cash in bank, stores on hand, and general liabilities ; and in my opinion the circumstances of the case require that all the property and liabilities

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shall be the subject of adjustment. It was urged that if the school-houses passed to the new authority in whose district they were situate they should pass subject to the debt owing in respect of each school respectively, and that there ought not to be any apportionment or adjustment, as the loans for each school were earmarked and kept separate; but the liability in respect of all the schools forms part of one aggregate liability of the old board, although the books very properly shew how much of the debt relates to the amount borrowed for the schools respectively. The entire debt of the old school board must be the subject of adjustment between the two new authorities. The answer to the first question will, therefore, be in the negative; and, by consent of the parties, I refrain from giving any answer to the second question, which is not very happily framed, or the special case may be treated as amended by striking out the second question. I leave the costs to be dealt with by the arbitrator.

Solicitors: *Philip Thornton, for C. D. Forster & Co., Newcastle-on-Tyne; A. B. Sanders, for Daglish & Mulcaster, Newcastle-on-Tyne.*

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Apportionment Act, 1870 (33 & 34 Vict. c. 35), s. 2.*

July 31;
Aug. 1, 2, 11.

The Apportionment Act, 1870, apportions liabilities as well as rights.

Swansea Bank v. Thomas, (1879) 4 Ex. D. 94; *In re South Kensington Co-operative Stores*, (1881) 17 Ch. D. 161, 165; *In re Wilson*, (1893) 62 L. J. (Q.B.) 628, 632; and *In re Howell*, [1895] 1 Q. B. 844, 847, followed.

The annual sums payable by a bishop in commutation of first fruits and tenths are “periodical payments in the nature of income” within s. 2, and therefore apportionable between successive bishops inter se; but, though now collected and administered by the Governors of Queen Anne’s Bounty, they are still in fact Crown debts enforceable by writ of extent, and therefore not apportionable against the Crown or the treasurer of Queen Anne’s Bounty.

ACTION.

This was a friendly action instituted with the assent and at the request of the Governors of Queen Anne’s Bounty to determine whether on the avoidance of a see the annual sums payable by the bishop for the time being in lieu or in respect of first fruits and tenths were apportionable in favour of the incoming bishop (a) as against the collector of first fruits and tenths, or (b) as against the predecessor in the see. The like questions arise on the avoidance of every ecclesiastical benefice chargeable with tenths.

By letters patent of May 17, 1905, the defendant the Right Rev. Edward Stuart Talbot (then Bishop of Rochester) was appointed Bishop of Southwark. His investiture took place on May 24, 1905. The plaintiff, the Right Rev. John Reginald Harmer, was subsequently appointed Bishop of Rochester and enthroned on July 20, 1905.

By letters patent of August 5, 1905, the defendant Le Fanu was appointed treasurer of Queen Anne’s Bounty, and became in virtue of that office collector of first fruits and tenths or the annual sums payable in lieu thereof.

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The defendant Le Fanu, as collector of first fruits and tenths, had claimed from the plaintiff, as Bishop of Rochester, the sum of 45*l.* in lieu of first fruits and 39*l.* 7*s.* 6*d.* in lieu of tenths, being the sums payable for the entire year ending December 25, 1905.

The plaintiff claimed :—

(1.) A declaration that, as against the defendant Le Fanu, these sums were to be treated as accruing from day to day and were apportionable between the incoming and outgoing bishop, and that the plaintiff was only liable to pay so much as accrued from May 24, 1905, to December 25, 1905.

(2.) Alternatively (and in the event of the first declaration not being made), a declaration that, as against the late Bishop of Rochester, the sums were to be treated as accruing from day to day and apportionable between the incoming and outgoing bishops, and that the late Bishop of Rochester was liable for the amount accruing due during his tenancy of the see between December 25, 1904, and May 24, 1905.

The defendant Le Fanu submitted that the sums payable were Crown debts, and not apportionable against the Crown.

The defendant the late Bishop of Rochester submitted that the sums payable were not apportionable for any purpose.

The action was tried on the pleadings.

The history of first fruits and tenths from their creation down to their transfer by the Crown to the Governors of Queen Anne's Bounty and their subsequent commutation in the case of bishoprics for annual payments is stated in the first part of the judgment, in which it is held that the sums payable, though now collected and administered by the Governors of Queen Anne's Bounty, are still in fact Crown debts enforceable by writ of extent, and therefore not apportionable against the Crown or the treasurer of Queen Anne's Bounty.

The arguments on the second question are alone reported.

George Lawrence, for the plaintiff, the present Bishop of Rochester. The liabilities for the annual sums payable in lieu of first fruits and tenths are apportionable between the present bishop and the late bishop *inter se*. The Apportionment Act, 1870, apportions liabilities as well as rights: *Swansea Bank v.*

Thomas (1); *In re South Kensington Co-operative Stores* (2); *In re Wilson* (3); *In re Howell*. (4) These annual sums are clearly "periodical payments in the nature of income" within s. 2 of the Act, and are therefore apportionable: *In re Griffith*. (5)

R. J. Parker, for the treasurer of Queen Anne's Bounty.

Dighton Pollock, for the late Bishop of Rochester. The Apportionment Act is an enabling Act passed for the benefit of landlords. It apportions receipts between successive recipients. It gives a landlord certain optional rights of recovering an apportionment from an outgoing tenant when the next rent falls due. But it does not relieve the incoming tenant of any liability, or in any way apportion the liabilities as between the tenants or other payers inter se. In *Ellis v. Rowbotham* (6) A. L. Smith L.J. says: "Is not the Apportionment Act an Act passed for the benefit of landlords?" In *In re Lucas* (7) Bowen L.J. says: "I had doubts during the argument of this case, and I still doubt, whether the Apportionment Act, 1870, altered the contract between landlord and tenant, and whether it made rent due from day to day in every sense; but it is not necessary to decide this, and I do not desire to give a final opinion on this point."

In *In re United Club and Hotel Co.* (8) Kay J., dealing with an argument that the accrued rent had become due from day to day, says: "The Act most carefully abstains from anything of the kind; it was intended for a wholly different purpose, namely, to divide between the persons, who by reason of death or assignment or otherwise become entitled to portions of accruing rent or interest, the amount of the accrued rent or interest when it becomes due. But the Act very carefully indeed points out that it does not mean to alter the due date in the least degree, or to make the rent or interest become due earlier than it would."

(1) 4 Ex. D. 94.

(2) 17 Ch. D. 161, 165.

(3) 62 L. J. (Q.B.) 628, 632.

(4) [1895] 1 Q. B. 844, 847. See

also *In re Leeks*, [1902] 2 I. R. 339

(C. A.), and *Glass v. Patterson*, [1902]

2 I. R. 660 (Div. Court, Kenny J. dissentiente).

(5) (1879) 12 Ch. D. 655, 662.

(6) [1900] 1 Q. B. 740; 16 Times L. R. 258, 259.

(7) (1885) 55 L. J. (Ch.) 101, 102.

(8) (1889) 60 L. T. 665, 666. 1

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In *Ex parte Dressler* (1) it was held by the Court of Appeal that the apportionment section of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 35, though giving a landlord a right of proof against a bankrupt's estate for the apportioned quarter's rent up to the adjudication as if the rent "grew due from day to day," did not relieve the trustee who remained in possession from his liability to the entire quarter's rent, a liability based on privity of estate. In *Titterton v. Cooper* (2) it was held by the Court of Appeal that a bankrupt's trustee, though not liable for the quarter's rent that accrued due before his appointment on January 3, 1881, was liable for the whole quarter's rent due at Lady Day. Although these cases were respectively decided eight and twelve years after the Apportionment Act, it was not mentioned, and the obvious inference is that it was considered inapplicable. *Swansea Bank v. Thomas* (3) only decides that when a quarter's rent is due the landlord can recover an apportioned part from an outgoing tenant who has assigned the lease during that quarter. It does not decide that he cannot recover the whole rent from the incoming tenant, or that, if he does so, the incoming tenant can recover anything from the outgoing tenant. The query at the foot of the report is well founded. The same remark applies to *In re South Kensington Co-operative Stores* (4), in which case *Ex parte Dressler* (1) was not cited. The two bankruptcy decisions of Vaughan Williams J. in *In re Wilson* (5) and *In re Howell* (6) are really inconsistent with the decisions of the Court of Appeal in *Ex parte Dressler* (1) and *Titterton v. Cooper*. (2) Again, these annual payments are not within the Apportionment Act at all. That Act only applies to "rents, annuities, dividends, and other periodical payments in the nature of income." These annual sums are not rents, annuities, or dividends. The general words "other periodical payments in the nature of income" should be read ejusdem generis according to the rule in *Fenwick v. Schmalz*. (7) "They must be in the nature of income; that

(1) (1878) 9 Ch. D. 252, 254, 256,
259.

(2) (1882) 9 Q. B. D. 473, 493.

(3) 4 Ex. D. 94.

(4) 17 Ch. D. 161, 165.

(5) 62 L. J. (Q.B.) 628, 632.

(6) [1895] 1 Q. B. 844, 847.

(7) (1868) L. R. 3 C. P. 313.

is, coming in from some kind of investment, as in the other cases with which the Act deals": per Lord Selborne L.C. in *Jones v. Ogle* (1), approved in *In re Cox's Trusts*. (2) These sums are really duties, charges, or taxes imposed by the State: 2 Phillimore's Ecclesiastical Law, 2nd ed. pp. 1355, 1641; and are therefore as unapportionable as parish rates: *In re Wearmouth Crown Glass Co.* (3)

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George Lawrence, in reply. The interlocutory observation of A. L. Smith L.J. in *Ellis v. Rowbotham* (4) does not appear in the Law Reports. It was presumably struck out on the revision of the judgment. In *In re Lucas* (5) Bowen L.J. expressly leaves the doubtful point open. In *In re United Club and Hotel Co.* (6) Kay J. was dealing with the contention that the claim to an apportioned part of a quarter's rent constituted a good petitioning creditor's debt on a petition for a winding-up order, although the quarter was still running. His statement of the purpose of the Act, though sufficient to negative that contention, was not intended to be exhaustive. The more obvious explanation of *Ex parte Dressler* (7) and *Titterton v. Cooper* (8) is that the Apportionment Act was simply overlooked. In *Jones v. Ogle* (1) Lord Selborne L.C. cannot have intended to limit "other periodical payments in the nature of income" to those arising from investment. Tenths were in fact called "one yearly rent or pension" in the 26 Hen. 8, c. 3, which created them, and first fruits in 1535 must practically have been the first year's rents. Sect. 5 of the Apportionment Act provides that "The word 'rents' includes rent service, rentcharge, and rent seck, and also tithes and all periodical payments or renderings in lieu of or in the nature of rent or tithe"; and "The word 'annuities' includes salaries and pensions." Even, therefore, if an ejusdem generis construction is adopted these sums are within the Act.

Cur. adv. vult.

(1) (1872) L. R. 8 Ch. 192, 198.

(2) (1878) 9 Ch. D. 159, 163.

(3) (1882) 19 Ch. D. 640.

(4) [1900] 1 Q. B. 740; 16 Times
L. R. 258, 259.

(5) 55 L. J. (Ch.) 101, 102.

(6) 60 L. T. 665.

(7) 9 Ch. D. 252, 254, 256, 259.

(8) 9 Q. B. D. 473, 493.

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Aug. 11. SWINFEN EADY J. The first question raised by this action is whether first fruits and tenths, or the annual sums now payable in lieu thereof, are apportionable as against the collector. This depends upon whether these sums constitute debts due to the Crown. If they are Crown debts, then it is conceded that they are not apportionable, as the Crown is not bound by the Apportionment Act, 1870, and first fruits and tenths, which have now become payable at Christmas annually, are not apportionable except by virtue of the Apportionment Act.

It is stated by Blackstone (Commentaries, vol. i. ch. 8, s. 4) that first fruits and tenths were first introduced into this country by Pandulph, the Pope's legate during the reigns of King John and Henry III. The first fruits—*primitiae* or *annates*—were the first year's whole profits of all spiritual preferments; and the tenths, or *decimae*, were the tenth part of the annual profit of each living.

By the Act 26 Hen. 8, c. 3, s. 2, it is provided that after January 1, 1535, the King's Highness, his heirs and successors, Kings of this realm, shall have and enjoy from time to time for ever the first fruits, revenues, and profits for one year of every bishopric or other spiritual benefice, and that every person appointed thereto shall satisfy and pay, or compound or agree to pay, to the King's use, at reasonable days, the said first fruits and profits for one year. By s. 9 of the same Act the King's Majesty and his successors shall yearly take and receive, united and knit to his Imperial crown for ever, one yearly rent or pension, amounting to the value of the tenth part of all the revenues and profits belonging to any bishopric or other spiritual benefice, the said pension or annual rent to be yearly paid for ever to the King, his heirs and successors, Kings of this realm, at the Feast of the Nativity. Thus first fruits and tenths were granted by statute to the King, and the persons accountable became debtors to the Crown.

By the Act 33 Hen. 8, c. 39, s. 55, debts due to the Crown were made enforceable by writ of extent, or *extendi facias*, and first fruits and tenths are expressly included. The writ of extent as a Crown process appears to be founded on this enactment: see

Chitty on the Prerogative of the Crown, p. 263. The writ of extent is still the process by means of which payment of first fruits and tenths is enforced where necessary.

By the statute 2 & 3 Anne, c. 20, Her Majesty was empowered by letters patent to erect a corporation, and settle on them and their successors the first fruits and tenths, for the augmentation of the maintenance of the poorer clergy; but by s. 2 of the same statute it is provided that all statutes and provisions concerning the ordering, levying, and payment of first fruits and tenths, or touching the charge or discharge of them, or any matter or thing relating thereunto, shall remain and continue in full force, and be observed and put in due execution, for such intents and purposes nevertheless as shall be contained or directed in or by the said letters patent. Pursuant to this statute, by letters patent dated November 3, 1704, a corporation was established by the name of "The Governors of the Bounty of Queen Anne for the Augmentation of the Maintenance of the Poor Clergy," and Her Majesty Queen Anne granted to that corporation all her revenue of first fruits and tenths.

Difficulties, however, arose in the collection of the tenths; and by the Queen Anne's Bounty Act, 1716 (3 Geo. 1, c. 10), the archbishops and bishops were discharged from receiving the tenths, and it is thereby provided that there shall be one collector or receiver of the tenths, who is thereby charged to collect the same, and he is to pay the sums of money yearly unto the receipt of His Majesty's Exchequer at Westminster, and every such collector and receiver, and his lands and tenements, are to stand charged and chargeable for the sure and true payment of such sums of money as he shall collect and receive of the yearly tenths; and such collector or receiver shall from time to time be nominated and appointed by His Majesty, his heirs and successors, by letters patent under the Great Seal of Great Britain; and s. 3 of the same statute provides that on default in payment of tenths, the treasurer, chancellor, and barons of the King's Exchequer shall, upon the certificate of the collector, issue process out of the King's Exchequer to enforce payment.

By the Queen Anne's Bounty Act, 1838 (1 & 2 Vict. c. 20), the offices of first fruits, tenths, and Queen Anne's Bounty were

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consolidated, and the treasurer for the time being of Queen Anne's Bounty was to be the one and only collector or receiver of the first fruits and tenths; but s. 4 of the same Act provides that the enactments making the sums payable immediately to the treasurer of Queen Anne's Bounty instead of being as theretofore first paid into Her Majesty's Exchequer shall not take away, lessen, defeat, prevent, or in any manner affect or alter any writ, process, or remedy theretofore in use in Her Majesty's name in Her Majesty's Court of Exchequer or otherwise for the recovery or compelling payment of the said first fruits and tenths, but that all such remedies shall be prosecuted in the Court of Exchequer in the name of Her Majesty or otherwise, and as fully and effectually, as if first fruits and tenths were still payable to the same officers as before the passing of that Act.

The result of these enactments is that first fruits and tenths still remain payable to His Majesty and constitute Crown debts, and payment may be enforced by writ of extent, as in the case of other Crown debts of record, although the sums collected are administered by the Governors of the Bounty of Queen Anne. It follows, therefore, that there is no apportionment against the Crown.

The remaining question is whether these outgoings are apportionable in favour of the incoming bishop as against his predecessor in the see. By an Order in Council made on November 27, 1852, in pursuance of the Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77), and gazetted December 17, 1852, p. 3667, Her late Majesty in Council approved and ratified a scheme whereby first fruits were commuted for an annual payment of 1*l.* for every 100*l.* of the annual income of the see, and tenths were commuted for an annual sum of 17*s.* 6*d.* for every 100*l.* of the annual income of the see, and the annual sums are to be paid on such days as tenths were then payable, that is to say, at Christmas in each year. First fruits as well as tenths are therefore now periodical payments, payable annually.

By the Apportionment Act, 1870, all rents, annuities, dividends, and other periodical payments in the nature of income shall (like interest on money lent) be considered as accruing from day

to day, and shall be apportionable in respect of time accordingly. The annual sums of 1*l.* per cent. and 17*s.* 6*d.* per cent., now payable in lieu of and in substitution for first fruits and tenths, are in my opinion "periodical payments in the nature of income" within the meaning of the statute. They represent a proportionate part of each year's income, payable to the Crown, pursuant to the statutes in that behalf.

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But it was contended that the Apportionment Act was only intended to affect the rights of the persons entitled to receive the income, and not to apportion, in respect of time, any liability to pay it. There are, however, four decisions to the contrary upon the interpretation of the Act. In *Swansea Bank v. Thomas* (1) it was held by Kelly C.B. and Huddleston B., on a special case, that under the Apportionment Act a landlord could recover a proportionate part of a quarter's rent under a lease for the period between the previous quarter day and the date of the assignment over by the defendant.

In *In re South Kensington Co-operative Stores* (2) it was held by Fry J. that the Apportionment Act governed the landlord's claim to rent, where a company had gone into liquidation, and that for the apportioned part of the rent up to the day when the liquidation commenced the landlord must prove, but that he was entitled to distrain for rent which accrued subsequently. The judge considered the question whether the dividing line between the period for which the rent was to be proved for and the period for which it was to be paid in full was to be a quarter day or an intermediate day, November 27, which was the commencement of the winding-up. He held that it must be the latter day, having regard to the Apportionment Act.

The next case is *In re Wilson*. (3) In that case Vaughan Williams J. decided that rent is apportionable as against the landlord under the Apportionment Act. He said: "As I understand *Swansea Bank v. Thomas* (1), the Apportionment Act, 1870, not only affects the right to recover rent but the liability as to the recovery of rent." Accordingly he determined that the

(1) 4 Ex. D. 94.

(2) 17 Ch. D. 161.

(3) 62 L. J. (Q.B.) 628, 632.

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right of the landlord to distrain was limited to the rent for the twelve days between the date of the receiving order and the next quarter day, October 11.

Again, in *In re Howell* (1) it was held that by virtue of the Apportionment Act rent for the first two months of a quarter "accrued due" from day to day, although not payable until the end of a quarter. Vaughan Williams J. said: "This was the view which I took in *In re Wilson* (2), where I held, following the decision of the Exchequer Division in *Swansea Bank v. Thomas* (3), that the Apportionment Act was intended not merely to affect the rights of the recipients of the rent inter se, but also to apportion the liability to pay the rent between the different occupiers of the premises during the currency of the quarter."

Although dicta may be found in other cases at variance with these decisions, there is not any direct authority of the Court of Appeal the other way, and, in accordance with these cases, I decide that, as against the defendant the Right Rev. Edward Stuart Talbot, as the late Bishop of Rochester, the annual payments are to be treated as accruing due from day to day, and are apportionable between the incoming and the outgoing bishop, and that the said defendant, as the late Bishop of Rochester, is liable for so much of the sums falling due on December 25, 1905, as accrued due during his tenancy of the said see, that is to say, the period between December 25, 1904, and May 24, 1905. I understand that an arrangement has been made as to the costs of these proceedings, which have not been brought because of any dispute between the parties, but to have the legal questions determined.

Solicitor: *Frederick Graham Hughes*.

(1) [1895] 1 Q. B. 844, 847. (2) 62 L. J. (Q.B.) 628, 632.

(3) 4 Ex. D. 94.

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*Power—Jointure— Power not yet in Existence—Defective Execution—Intention
—Execution by the Court.*

July 25.

T. B. Charlton by his will made in 1882 devised real estate and declared that it should be lawful for every tenant for life thereof to charge it by deed or will with a jointure not exceeding 400*l.* a year in favour of his wife. In 1885 N. J. Charlton, the testator's son, executed a marriage settlement whereby he covenanted to charge all real and personal estate which might come to him from his father with the payment of a jointure of 400*l.* a year to his wife. At the date of the settlement the testator was still alive, and the power to charge had not come into existence. He died in 1886, and N. J. Charlton became tenant for life of his real estate and donee of the power. In June, 1892, a draft deed was settled and approved on behalf of N. J. Charlton whereby he charged the real estate with 400*l.* a year for his wife; but he died a few days afterwards without having executed the deed. His widow claimed a jointure of 400*l.* a year:—

Held, that the covenant in the settlement was a defective execution of the power to which the Court would give effect; that the approval of the draft deed operated as a selection of the property to be charged; and that the widow was entitled to a jointure of 400*l.* a year charged on the real estate devised by the testator.

ACTION.

Thomas Broughton Charlton by his will dated November 13, 1882, devised real estate to trustees for the term of 1000 years upon trusts thereafter declared, and after the expiration of the term and in the meantime subject thereto to the use of his son Nicolas John Charlton for life, and after his decease to the use of Geoffrey Nicolas Charlton, the only son of N. J. Charlton, for life, and then to the use of G. N. Charlton's sons in tail; and the testator declared that it should be lawful for "every male person hereby made tenant for life of the hereditaments hereinbefore devised either before or after he shall under this my will be entitled to the possession or to the receipt of the rents and profits of the said hereditaments (but subject and without prejudice to the uses and estates preceding the estate of the person

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for the time being exercising this power and to the powers annexed to such preceding uses or estates and to the uses or estates limited in exercise of such powers) by any deed or deeds with or without power of revocation and new appointment or by will or codicil to limit and appoint to the use of or to any person or persons in trust for any wife whom he shall have married or shall thereafter marry for her life or for any less estate by way of jointure any annual sum or yearly rent charge not exceeding in the whole the yearly sum of 400*l.* sterling to be issuing out of and charged upon all or any of the said hereditaments clear of all charges taxes and outgoings whatsoever and to be paid in such manner as to him shall seem meet."

By an indenture dated July 14, 1885, and made between N. J. Charlton of the first part, the Hon. Helen Scarlett, spinster, of the second part, and trustees of the third part, being a settlement made in consideration of the marriage then intended and shortly afterwards solemnized between the two first parties, it was witnessed that in "pursuance of the said agreement and in consideration of the said intended marriage the said N. J. Charlton with the privity and approbation of the said Helen Scarlett hereby covenants with the trustees that in case the said intended marriage shall be solemnized within six calendar months from the date hereof but not otherwise he the said N. J. Charlton will at some time or times during his life by some deed or deeds or by his last will or some codicil or codicils thereto well and effectually and to the satisfaction of the trustees or the survivors or survivor of them or the executors or administrators of such survivor or other the trustees or trustee for the time being of these presents (hereinafter called 'the trustees or trustee') and in such manner and by such assurances assignments devises and bequests as the trustees or trustee or their or his counsel in the law shall reasonably require charge all and singular the real and personal estate which may descend to or devolve upon or accrue to him the said N. J. Charlton on the death of his father T. B. Charlton whether under settlement will codicil intestacy or otherwise howsoever or so much and such part or parts of the said real and personal estate as the trustees or trustee shall in their or his discretion deem sufficient

with the payment after the death of the survivor of them the said N. J. Charlton and T. B. Charlton to the said Helen Scarlett if she shall be then living during the then remainder of her life of the annual sum of 400*l.* for her jointure and in bar of dower to commence from the death of the survivor of the said N. J. Charlton and T. B. Charlton and to be considered as accruing from day to day but to be paid without any deduction except succession duty by equal half-yearly payments the first of such payments to be made at the end of six calendar months after the death of the survivor of the said N. J. Charlton and T. B. Charlton."

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At the date of the settlement T. B. Charlton was still alive, so the power to charge a jointure had not come into operation. He died on January 16, 1886, without having revoked or altered his will; and N. J. Charlton thereupon became the tenant for life of the estate and the donee of the power to charge a jointure on the land.

On November 5, 1887, N. J. Charlton made a will whereby in exercise of the power he charged the land in favour of his wife with a jointure of 400*l.* a year payable during her widowhood only.

On June 1, 1892, after negotiations which had been carried on with an interval since 1890, a draft deed was settled and approved on behalf of N. J. Charlton for providing his wife under the power with a jointure of 400*l.* a year for her life charged on the land. He died a few days afterwards without having executed the deed.

His widow brought this action for a declaration that she was entitled for her life to a jointure of 400*l.* a year charged on the land devised by the will of T. B. Charlton.

Norton, K.C., and *E. S. Ford*, for the widow. The covenant in the settlement was an exercise of the power, and the approval of the draft deed operated as a selection of the property to be charged. Therefore the plaintiff is entitled to have a jointure of 400*l.* a year for her life charged on the real estate.

A power which is not to arise till a future event happens cannot, as a general rule, be exercised before that event happens, for until then it has no existence; but a power of jointuring is

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 an exception to that rule: Farwell on Powers, 2nd ed. p. 519. A power of jointuring can be exercised by a covenant although the covenantor has not come into possession of the estate. It is looked upon as a defective exercise of the power to which the Court will give effect on the same basis as specific performance, even though the covenantor when he comes into possession is incapable of exercising the power: *Affleck v. Affleck*. (1) The land is bound as soon as the donee of the power obtains possession. It is true that this power was not in existence when the settlement was executed, but N. J. Charlton obviously knew of the power in his father's will and made the covenant with reference to it. A power to jointure can be exercised before it arises, and a defective execution of it will be enforced by the Court if the intention to execute it is clear: *Shannon v. Bradstreet* (2); *In re Lambert's Estate* (3); *Holroyd v. Marshall*. (4)

Secondly, we submit that the approval by N. J. Charlton of the draft deed denotes the particular property that is to be the subject of the charge: *Dowager Countess of Coventry v. Earl of Coventry* (5); *Jackson v. Jackson*. (6) It is important that the property which is to be charged should be specified so as to avoid questions of marshalling which might arise under the covenant.

Borthwick, for the tenant for life and the infant remainderman. The Court is asked to go beyond any of the authorities. In all the cases which have been cited the power was in existence when the defective execution took place. Here no power had been created at the date of the settlement. A defective execution of a power implies an existing power. The statement in *Shannon v. Bradstreet* (2) that "a covenant is a sufficient declaration of intent to execute, even when made before the power arose," is qualified by the words which follow; it does not mean before the power comes into existence. Approval of the draft deed is not enough to be treated as a defective exercise of the power, even if combined with the covenant. N. J. Charlton did not intend to exercise the power by the covenant. The covenant was not

(1) (1857) 3 Sm. & Giff. 394.

(4) (1862) 10 H. L. C. 191.

(2) (1803) 1 Sch. & Lef. 52, 60, 63.

(5) (1724) 2 P. Wms. 222; 1 Str.

(3) [1901] 1 I. R. 261, 268.

596.

(6) (1793) 4 Bro. C. C. 462.

to exercise a power, but to provide for his widow out of property which might devolve upon him from his father. That means his own property. It is doubtful whether the words of the covenant are satisfied by this property, which was only his for his life.

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No reply was called for.

WARRINGTON J. stated the facts, and continued:—The question is whether the plaintiff is entitled by virtue of the covenant in the settlement of July 14, 1885, and of the intent to execute the power of jointuring shewn by the approval of the draft deed of June 1, 1892, to a jointure of 400*l.* during her life, or whether she is only entitled to the jointure during widowhood under the will. It is purely a matter of law. It is said on behalf of the plaintiff that, in the case of a jointure at all events, a covenant to execute a power of jointuring, although that power may not be in existence at the date of the covenant, is in equity an effectual exercise, or rather, I should say, that a Court of Equity will in such a case interpose and effectuate the defective exercise and render it a due execution of the power. In support of this several cases have been referred to. I will take *Affleck v. Affleck* (1) as the best for my purpose, because in that case there is a judgment which seems to me to put the principle upon which the Court acts on grounds which would apply here. The facts there were that Sir Gilbert Affleck on his marriage covenanted that if he came into possession of certain estates by virtue of a will which was then in operation—so far the facts of that case are different from those we have here—he would exercise a power of jointuring which was given by the will but could not be exercised till he became tenant in possession, which then he was not. Before he came into possession he became of unsound mind, and so unable to exercise the power after it became exercisable by him. It was held by Stuart V.-C. that before he became of unsound mind there had been a defective execution of the power which the Court would enforce against the remainderman. There is a difference between that case and this in the fact that there the power was already in existence, although

(1) 3 Sm. & Giff. 394.

WARRING- it was not capable of being exercised by the donee until as
TON J. tenant for life he came into possession. But the principle
1906 upon which the Vice-Chancellor rested his judgment applies
CHARLTON to the present case. After stating the facts he says (1): "The
F. right of the plaintiff, therefore, must depend on the covenant
CHARLTON. in the marriage settlement of 1834, executed before Sir
Gilbert was in possession of the estates. It is not disputed
that the covenant of Sir Gilbert, although executed by him
as a remainderman, and before his right to the possession
had accrued, would have been enforced in equity against
him when he came into possession if he had continued of sound
mind. The case of *Jackson v. Jackson* (2), and other authorities,
have established the right to equitable relief. Lord Redesdale,
in *Shannon v. Bradstreet* (3), speaking of powers to jointure,
says, 'It has been determined that a covenant is a sufficient
declaration of intent to execute, even when made before the
power arose, as where a power is limited to be exercised by the
tenant for life in possession, and he covenants that when he
comes into possession he will execute. In all these cases Courts
of Equity have relieved'." So far it would appear that the Vice-
Chancellor had said enough for the purpose of his decision, but a
particular defence had been set up that, inasmuch as during the
whole time the tenant for life was in possession he was of
unsound mind and incapable of exercising the power, the power
must be treated as if there had been no execution of it at all.
The Vice-Chancellor meets that argument thus: "This argument
seems not consistent with the principle on which relief is given
on the covenant to exercise the power, where that covenant
is entered into before the time when the power is to come into
operation. The Court acts on the principle that the covenant,
as a defective execution of the power, affects and binds the land
as soon as the time arrives at which the covenantor has
authority to bind the land. The operation of the covenant is
independent of any neglect or refusal or subsequent act of the
covenantor." Then later he says: "When the covenantor
comes into possession of the estate, if the covenant be valid, it is

(1) 3 Sm. & Giff. 401, 402.

(2) 4 Bro. C. C. 462.

(3) 1 Sch. & Lef. 52, 63.

in itself such an execution of the power as will be made good by the settled rules of the Court; and therefore the capacity or incapacity of the tenant for life to execute any further deed seems an unimportant circumstance where the charge created by the covenant has, by operation of the covenant, become attached to the lands." The words "charge created by the covenant" are most important. He goes on: "The authorities shew that no further act or consent of the covenantor is necessary to create the charge. The covenant itself can be enforced against the land, even if he refuses to make it good." And later: "Having the power and capacity to execute is of the essence of the power, just as much as a will and intention to execute—as much and no more. The same principle therefore which gives effect to the covenant as an execution, although a defective execution, of the power against a subsequent want of will and intention, must give effect to it against a subsequent want of capacity. In both cases effect is given to the covenant as a valid instrument binding the estate, without reference to the subsequent want of consent or capacity on the part of the donee of the power. The Court is bound to give its assistance and enforce the charge, not merely because the covenant is duly executed, but because it has been executed in consideration of money received, and in favour of a wife who contracted a marriage on the faith of that covenant." The Vice-Chancellor puts the principle as resting on the same ground as that upon which the doctrine of specific performance rests. There is no doubt that if a person, not being entitled to any estate, covenants that if he shall hereafter become entitled to land he will convey the estate, the covenant being for valuable consideration, the covenant will be enforced when he becomes entitled, and when he comes into it the land will be bound by the covenant itself. Stuart V.-C. puts the principle he was discussing on the same ground as that which I have just expressed.

But in order to enforce that, it is necessary that the plaintiff should shew that on the true construction of the covenant it was intended to apply to the power given by the will, and one of the defences is that it was not. So I must go back and consider the covenant and see what the covenantor intended to do. [His Lordship referred to the covenant.]

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In my judgment the meaning of the covenant is that the covenantor would create a charge by virtue of any estate to which he might become entitled, or of any power which might be given to him under his father's will. In the circumstances of this case I must give as wide a construction to the covenant as possible, and I think he did intend to charge the estate, if he got it, or by virtue of the power if he got that only. If that is so, when the time comes that, as in *Affleck v. Affleck* (1), the covenantor was entitled to create the charge the covenant became operative to charge the estate.

But that is not the whole of the matter. If it were, the charge would be upon the whole estate, both real and personal. The plaintiff says it is not on the whole property, but only on the real property selected for that purpose by the parties in 1892, and that their intention is defined by their approval of the draft of June 1, 1892. On this point *Dowager Countess of Coventry v. Earl of Coventry* (2) is relied on by the plaintiffs, and is directly in point. There a tenant for life, Gilbert, had power to charge a certain estate with a jointure. Upon his marriage he covenanted to make a jointure by virtue of the power or otherwise of 500*l.* Exactly the same question arose there as here, namely whether, assuming that the covenant was operative to exercise the power, it operated to charge not merely the settled estate, but the personal estate as well. It was held that only the real estate was charged, for the reason that in 1719 subsequently to his marriage drafts of certain deeds had been settled, but not executed, whereby Gilbert Earl of Coventry charged particular selected estate with 500*l.* There was a great deal of argument, and two Barons of the Exchequer were summoned to assist the Lord Chancellor. It was held that the power was duly exercised and was confined to the particular lands which were selected by the drafts which had been approved. It is enough if I read the note on p. 233, which states that the decree "declared that although the said Gilbert Earl of Coventry was but tenant for life of the estate, yet by the said will of Thomas Earl of Coventry, his father, he had a power to settle an estate for life of the yearly value of 500*l.* on such wife as should bring a portion equivalent to such

(1) 3 Sm. & Giff. 394.

(2) 2 P. Wms. 222.

settlement, and the plaintiff having brought such portion is a purchaser for a valuable consideration, and by virtue of the power which the said Earl Gilbert had on the estate, the articles executed by him on his marriage with the plaintiff are a lien thereon. And the Court further declared that the said deeds of July 5 and 6, 1719, having been prepared and engrossed by the directions of the said Earl Gilbert, the same ought to be taken to be a specification of the lands to be settled on the plaintiff, and the lands therein mentioned ought to be bound thereby, and by the marriage articles, although the said deeds of settlement were not actually signed and sealed by the said Earl Gilbert, and doth therefore order that the said Earl do deliver to the plaintiff the possession of the lands comprised in the deeds of appointment of July 5 and 6, 1719, and that the plaintiff do hold and enjoy the same during her life against the said defendant the Earl of Coventry and the other defendants, Tho. Coventry and Hen. Coventry, and all claiming under them; and that the defendant the Earl of Coventry do account for the rents and profits from the death of Earl Gilbert." That case seems to me to be directly in point upon the plaintiff's second argument, and the conclusion which I must draw, upon the authorities, is therefore, first, that the covenant was an exercise of the power to jointure; and, secondly, that the approval of the draft deed was a sufficient selection of the property upon which the charge was to operate. I will accordingly make a declaration that the plaintiff is entitled under or by virtue of the covenant contained in the indenture of July 14, 1885, and the draft deed approved on June 1, 1892, as from the death of N. J. Charlton during the remainder of her life to the annual sum of 400*l.* for her jointure, to be charged upon the freehold lands and hereditaments devised by the will of T. B. Charlton, of which lands and hereditaments the defendant G. N. Charlton is tenant for life and N. P. Charlton tenant in remainder.

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Solicitors: *Robins, Hay, Waters & Hay*; *T. B. & W. Nelson*,
for *Freeth, Rawson & Cartwright*, Nottingham.

H. C. R.

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[1905 W. 3481.]

July 21, 26. *Lessor and Lessee—Option to purchase Reversion in Fee—Interest in Land—Perpetuity—Contract to convey at Time beyond Period allowed by Rule against Perpetuities—Damages for Breach of Contract—Charity.*

In 1878 land was demised to the plaintiffs' predecessors for thirty years from September 29, 1876, to be used as a public park; and the lease contained a proviso that at any time during the term the lessor, her heirs or assigns, would, on receiving notice from the plaintiffs of their desire to purchase the land, convey it to them for 1325*l.* The lessor died in 1902. In 1905 the plaintiffs served on her devisees notice of their desire to purchase. The devisees maintained that the option was void as infringing the rule against perpetuities; and the corporation brought this action against them and the lessor's executor for specific performance of the contract to sell, or in the alternative, damages for breach of contract:—

Held, that the option to purchase was void for remoteness, and could not be enforced by specific performance; that this defect was not cured by the fact that the option was given for charitable purposes, inasmuch as the interest of the charity did not become effective till the happening of the future event; but that the plaintiffs were entitled to recover damages from the defendants for breach of the covenant to convey.

By a lease dated October 1, 1878, Fanny Heather demised to the local board of health for the district of Worthing some meadow land for a term of thirty years from September 29, 1876, at the yearly rent of 35*l.*, and the board for themselves, their successors and assigns, covenanted that they would not during the term use the demised premises or any part thereof for any purpose other than that of a public park or pleasure ground.

The lease contained a proviso as follows: "Provided always And it is hereby agreed and declared that in case the said board their successors or assigns paying the said rent hereby reserved and observing performing and keeping all the covenants on their part herein contained shall be desirous at any time during the said term hereby granted to purchase the fee simple and inheritance of the said premises at the sum of 1325*l.* and of such their desire shall give to the said Fanny Heather

her heirs or assigns six calendar months previous notice in writing expiring at the end of any half year of the said term then and in such case the said Fanny Heather her heirs or assigns shall deliver to the said board their successors or assigns a copy of the abstract of title to the same premises which was delivered to her on the occasion of her purchase thereof such abstract commencing with indenture of 30th May 1832 between Richard Lindup and Jane his wife of the first part George Newland of the second part Frances Lindup of the third part and Richard Newland and James Stubbs of the fourth part and no prior or other title shall be required And will on payment by the said board their successors or assigns of the said sum of 1325*l*. together with interest thereon at the rate of 5*l*. per cent. per annum from the expiration of such notice until payment and of all rent then accrued execute a proper conveyance and assurance of the said premises and the inheritance thereof in fee simple unto the said board their successors and assigns or as they shall direct such conveyance or assurance to contain similar covenants on the part of the said board their successors or assigns with the said Fanny Heather her heirs and assigns to those hereinbefore contained relative to the user of the said premises solely as a public park walk or pleasure ground and to the erection thereon of no other erection or building except such lodge and other buildings as are hereinbefore referred to (such covenants being so framed as that the burden thereof shall so far as is possible run with the said premises)."

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On August 25, 1890, the plaintiffs were incorporated by Royal charter, and succeeded under s. 310 of the Public Health Act, 1875, to all the property of the local board of health. They continued to use the land as a public park. Mrs. Heather died in 1902, having by her will devised all her real and residuary personal estate to C. H. Heather and V. J. Heather in equal shares, and appointed J. Goldsmith and E. Sayers executors.

On August 17, 1905, the plaintiffs served on the devisees notice of their desire to exercise the option given to them by the lease by purchasing the fee simple of the demised premises for 1325*l*. upon the terms and conditions mentioned in the lease.

The devisees repudiated their obligation to comply with the

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notice, and insisted that the option was void as infringing the rule against perpetuities. The corporation thereupon brought this action against the devisees and the surviving executor, and asked for—(1.) a declaration that they were entitled to specific performance of the agreement constituted by the lease and the notice for the sale to them of the fee simple of the premises, and consequential relief on the footing of such declaration; (2.) if for any reason the agreement could not be specifically performed, damages against the estate of Mrs. Heather for breach of covenant; (3.) in default of admission of assets by the executor, administration of the real and personal estate of Mrs. Heather, and, so far as might be necessary, to follow her assets into the hands of the defendants Heather.

H. Terrell, K.C., and *R. J. Parker*, for the corporation. The proviso in the lease which gave us an option to purchase created an interest in land which, according to the decision in *Woodall v. Clifton* (1), infringed the rule against perpetuities, and was therefore void, so we cannot ask in this Court for specific performance. But we do ask for damages for breach of contract. That point was not considered in *Woodall v. Clifton* (1), and is now open unto us; and we contend that the defendants are liable to pay damages for breach of the contract to convey the land to us. The rule against perpetuities has no application to personal contracts. It only applies to interests in land: *Walsh v. Secretary of State for India* (2); *Borland's Trustee v. Steel Brothers & Co.* (3); *Muller v. Trafford*. (4) Interference with alienation does not make the contract void. "If the feoffee be bound in a bond, that the feoffee or his heires shall not alien, this is good, for he may notwithstanding alien if he will forfeit his bond that he himself hath made": Co. Litt. 206 b. Therefore, although the option is void under the rule against perpetuities, we can still recover damages. Specific performance is only an equitable addition to the common law remedy of damages; and the latter is not necessarily destroyed because the former is withheld.

[They were stopped on this point.]

(1) [1905] 2 Ch. 257.

(2) (1863) 10 H. L. C. 367.

(3) [1901] 1 Ch. 279.

(4) [1901] 1 Ch. 54.

Secondly, we say that, inasmuch as this land was to be conveyed for charitable purposes, the option is not void as a breach of the rule against perpetuities. It is settled law that if property is given to a charity and the charity takes an immediate interest in it the rule does not apply: *Chamberlayne v. Brockett*. (1) The charity is itself a perpetuity. On a transfer of the property from one charity to another the rule does not apply, although it does apply on a transfer to a charity from an individual: *In re Tyler*. (2) The question, therefore, in this case is whether the charity takes an immediate interest, or whether it takes an executory interest to arise on an event which may occur after the period allowed by the rule: *London and South Western Ry. Co. v. Gomm* (3); *In re Bowen*. (4) Here the interest taken by the charity is the same interest as that immediately vested in it, and the right subsequently ripens into an absolute instead of a conditional interest.

Rowden, K.C., and *C. Stafford Crossman*, for the defendants. The proviso is void under the rule against perpetuities, and the Court will not enforce it by giving damages. The rule is explained in *In re Oliver's Settlement*. (5) It is based on grounds of public policy. This proviso prevents the owners from disposing of their land for a period which may exceed a life or lives in being and twenty-one years afterwards, and is therefore void: *Egerton v. Earl Brownlow* (6); Pollock on Contracts, 7th ed. p. 315. The proviso is illegal, and illegality may be pleaded as a defence to this action: *Collins v. Blantern* (7); 1 Smith's Leading Cases, 11th ed. pp. 369, 377; *Fisher v. Bridges*. (8) This is not a mere personal contract and therefore outside the rule; it is a contract which gives an interest in land. So *Walsh v. Secretary of State for India* (9), *Muller v. Trafford* (10), and *Borland's Trustee v. Steel Brothers & Co.* (11) have no application. If the proviso infringes the rule against perpetuities the contract is bad altogether. It cannot be split up into two contracts, a personal

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(1) (1872) L. R. 8 Ch. 206.

196, 244.

(2) [1891] 3 Ch. 252.

(7) (1767) 2 Wils. 341.

(3) (1882) 20 Ch. D. 562.

(8) (1854) 3 E. & B. 642.

(4) [1893] 2 Ch. 491.

(9) 10 H. L. C. 367.

(5) [1905] 1 Ch. 191, 196.

(10) [1901] 1 Ch. 54.

(6) (1853) 4 H. L. C. 1, 125, 148,

(11) [1901] 1 Ch. 279.

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contract and a contract which creates an interest in land: *Sykes v. Beadon* (1); *London and South Western Ry. Co. v. Gomm*. (2) Therefore the plaintiffs cannot maintain an action for damages for breach of the contract. No Court will assist them to enforce an illegal contract. The passage in Co. Litt. 206 b. has been disapproved: 1 Smith's Leading Cases, 11th ed. p. 435; *Jervis v. Bruton*. (3)

[*H. Terrell, K.C. Freeman v. Freeman* (4) and *Collins v. Plummer* (5) are to the opposite effect.]

Assuming that the contract can be split up and the remedy by damages be sued for apart from the remedy by specific performance, the Court will not give damages. The cases on the rule against perpetuities speak of the tendency to create a public mischief. Anything which tends to create a perpetuity is illegal. If the plaintiffs can recover damages there will be a tendency to insert such provisions in other leases and thus tie up the land. The Court will be indirectly enforcing an illegal contract. An owner who has agreed to such an option will be unable to sell his land without taking a covenant of indemnity from his purchaser. The plaintiffs cannot rely upon the fact that this proviso was for charitable purposes, for it is clear that they did not acquire an immediate interest: *In re Lord Stratheden and Campbell*. (6)

No reply was called for.

WARRINGTON J. This is an action for, first, specific performance of a certain contract taken in the form of an option to purchase contained in a lease; secondly, and alternatively, for damages for breach of that contract. The contract is not denied. The defences to it are purely legal. The first defence is that, so far as it is an action for specific performance, it cannot be enforced because in equity, in which Court alone specific performance can be granted, it creates an interest in the land, and that interest is void as infringing the rule against perpetuities. The action is defended, so far as it is an action for damages, on

(1) (1879) 11 Ch. D. 170.

(2) 20 Ch. D. 562.

(3) (1691) 2 Vern. 251.

(4) (1691) 2 Vern. 233.

(5) (1708) 2 Vern. 635.

(6) [1894] 3 Ch. 265.

the ground that it is a contract which tends to bring about an infringement of the rule against perpetuities, and, therefore, cannot be enforced in a Court of law any more than it could be enforced in a Court of Equity in the way of specific performance. [His Lordship stated the facts, and continued :—]

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Now first with regard to the claim for specific performance : If the covenantee had been an individual, and if the purpose for which the land was to be granted had not been, as it is, a charitable purpose—a point with which I shall have to deal directly—it is admitted that after the decisions of the Court of Appeal in the case of the *London and South Western Ry. Co. v. Gomm* (1), and my own decision in *Woodall v. Clifton* (2), it would be impossible for this Court to hold that that contract could be specifically enforced. It is said, however—and I propose to deal with this point first—on the part of the plaintiffs that the purpose for which this land was to be conveyed was a charitable purpose, and, therefore, notwithstanding the fact that the interest which the deed creates would in an ordinary case be void for remoteness, the object being charity, it would not be so void. In my opinion no distinction can be drawn on that ground between this case and the ordinary case of a contract with an individual. Although the interest of the charity is created by the contract, it does not become effective until the happening of a future event, and it is the very postponement of its effectiveness which renders it obnoxious to the rule against perpetuities. In my judgment the case in this aspect of it is undistinguishable from the case of a limitation to an individual followed by a limitation to a charity, void because it is not to take effect until a time outside the limits of the rule against perpetuity. I think it is clear in that case the limitation would be void notwithstanding that it is a limitation to a charity. In the case of *In re Bowen* (3) it was decided by Stirling J.—for this purpose it is enough to read the head-note—that “The principle established by *Christ’s Hospital v. Grainger* (4) and *In re Tyler* (5) that the rule against perpetuities has no application to the transfer in a certain event of

(1) 20 Ch. D. 562.

(3) [1893] 2 Ch. 491.

(2) [1905] 2 Ch. 257.

(4) (1849) 1 Mac. & G. 460.

(5) [1891] 3 Ch. 252.

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property from one charity to another does not extend to cases where (1.) an immediate gift in favour of private individuals is followed by an executory gift in favour of charity, or (2.) an immediate gift in favour of charity is followed by an executory gift in favour of private individuals." The same principle is illustrated by a subsequent case of *In re Lord Stratheden and Campbell*. (1) There the testator bequeathed an annuity of 100*l.* to be provided to the Central London Rangers, a volunteer corps, on the appointment of the next lieutenant-colonel. It was held, first, that that bequest was a charitable bequest; and, secondly, that the gift was void because it infringed the rule against perpetuities. There, as in the present case, immediately on the death of the testator, just as here on the execution of the deed, the charity obtained an interest—that is to say, they were entitled if it were not void to this bequest; but the bequest in that case, as the interest in this case, was to become effective only on the happening of a future event, which was too remote. It seems to me that that case is a direct authority against the contention of the plaintiffs, founded on the argument that the covenantee in this case was a charity.

Now I come to the second aspect of the action, in which it is a mere action at common law for damages for breach of the contract. Would that contract have been void at common law? That is to say, was it such a contract that a Court of law would not entertain an action for damages for its breach? It is a contract to convey land to the purchaser upon the happening of an event which might occur at a more remote period than lives in being and twenty-one years afterwards. In the act of making such a conveyance there is nothing illegal—that is to say, if the covenantor chose in the year 1898 to convey this land to the corporation of Worthing she would have been performing a perfectly legal act. The act, therefore, which the covenant binds the covenantor to perform is not an illegal act. What alone is illegal is the limitation of land which is to take effect at a period too remote. How is it that that contract, which is in form a mere personal contract that the covenantor will do such an act, becomes a limitation? In a

(1) [1894] 3 Ch. 265.

Court of common law it would not have that effect. So far as regards the jurisdiction in a Court of common law, the covenantor might convey away the land notwithstanding the covenant. He might devise it; he might allow it to descend, and the covenantee would have no means of getting the land either from the grantee or from the devisee or from the heir-at-law. The only right which the covenantee would have had in a Court of common law would have been to recover damages. In a Court of Equity the covenant is held to affect the conscience of the covenantor in such a way that he cannot convey away the land to any person who is in the same position as he is himself, that is to say, to a person who is not a purchaser for value without notice; and by the operation of the doctrine of specific performance the covenantee in a Court of Equity is regarded as having an actual interest in the land to which the covenant applies. In other words, in the contemplation of a Court of Equity, the contract, being for valuable consideration, is executed to the extent to which the interest, which ought under that contract to be created by the subsequent act on the part of the covenantor, is created by the covenant itself.

Now there is no conflict between the doctrines of law and equity in this respect. The relief given in a Court of Equity is merely relief supplemental to, and in most cases more effectual than, the relief given at common law, but there is no conflict between the doctrines of law and equity so as to compel one to regard this covenant merely as creating a limitation upon the equitable doctrines. It remains since the Judicature Act as it did before—it remains a common law contract capable of being enforced in a Court of common law without reference to the laws of equity. Realizing that difficulty, the defendants are compelled to rest their case upon the contention that the contract, though not in a Court of common law effecting that which the law regards as against public policy—namely, the tying up of land for a period beyond that allowed by the rule—indirectly tends to bring about the same result. It is there that I join issue with the defendants. It seems to me that, rightly considered, the contract does not tend to bring about that result. It is quite true that the covenantor may if he pleases carry it out, and it may be to

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his advantage to do so, but he is not compelled to carry it out. It seems to me that that argument depends on this fallacy. It is not in my opinion the contract which is void because it infringes the rule against perpetuities, but it is the limitation which, by the operation of the doctrines of the Court of Equity, it is the effect of the contract to create, that is void. The contract remains a valid contract in every respect, but it is the limitation it creates in the contemplation of the Court of Equity, and it is that alone, which is void. It seems to me, therefore, that in principle there would have been in an old Court of common law before the Judicature Act no defence to this action; and further, that in this Court also, since the Judicature Act, there is no defence, because for this purpose the Court is sitting as a Court of common law.

Now, is there any authority which compels me to say that that opinion which I have already formed on principle is not the correct opinion? I have been referred to three cases reported in 2 Vernon—a case of *Freeman v. Freeman* (1), a case of *Jervis v. Bruton* (2), and the case of *Collins v. Plummer*. (3) The only one of those three which in any way helps the defendants is *Jervis v. Bruton*. (2) The case is very shortly reported, and the report is in these terms: “John Morris settles land on his daughter and the heirs of her body, remainder to his own right heirs, and takes a bond from the daughter not to commit waste; the daughter having levied a fine, and afterwards committing waste, the bond was put in suit.” The only report of the judgment is this: “Per curiam An idle bond, and decreed to be delivered up to be cancelled; and like *Poole’s Case*, cited in the case of *Tatton v. Mollineux* (4), where a recognisance conditioned that the tenant in tail should not suffer a recovery, is decreed to be delivered up, as creating a perpetuity.” It is very difficult to understand that. No reasons are given for the finding that it was an idle bond. There is a note which throws some light on it by the editor of the edition of Vernon’s Reports which I have before me. It is edited by John Raithby, and that note states this: “The settlement was on the daughter

(1) 2 Vern. 233.

(2) 2 Vern. 251.

(3) 2 Vern. 635.

(4) (1610) Sir F. Moore, 809.

in fee, and on her marriage with the plaintiff who had survived her were settled in trust to the use of the plaintiff and his wife (the daughter of the said John Morris) for life, to the use of their heirs begotten by the plaintiff, and for default of such issue, to the heirs of the plaintiff; the plaintiff's wife died without having had any issue, and the decree declared that the bond in question had been ill-obtained against the said plaintiff's wife, and that the plaintiff was seised in fee; and decreed the bond to be delivered, and the defendants to pay costs at law (they having proceeded on the bond) and in this suit." It seems to me that that note throws some light on the report, and that the reason of the finding was not that which at first sight would appear to be the reason if one were to take the report by itself. But in the case of *Collins v. Plummer* (1) we have a case on the other side, which may fairly be set against *Jervis v. Bruton* (2) even if *Jervis v. Bruton* (2) is to be regarded on the point which I have before me. In that case the head-note is this: "A. on his marriage settles land to the use of himself for life, then to the wife for life, remainder to the heirs of his body begotten on the wife, remainder to his own right heirs; and covenants in the settlement not to bar the entail, nor suffer a recovery; and having one daughter, to whom on her marriage he had given a good portion; he suffers a recovery, and by will devises the estate to his daughter for life, and to her first &c. sons in tail, with remainders over. On a bill for a specific performance of the covenant, the Court would not decree it, but leave the party to recover damages at law, for breach of the covenant." It is plain, therefore, that the Court in that case did not hold the covenant to be void at law, because it is difficult to understand why, if the Court had so held, it did not exercise the further equitable jurisdiction of granting an injunction to restrain proceedings at law on the covenant, when it refused specific performance. It seems to me that the Court in that case regarded the covenant as a valid covenant at law, although it could not be enforced specifically in equity.

Another authority which has been referred to is the case which I have already mentioned of *London and South Western*

(1) 2 Vern. 635.

(2) 2 Vern. 251.

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Ry. Co. v. Gomm. (1) That was an action in equity only to enforce a somewhat similar contract to the present one. It was an action, not brought against the covenantor or against the legal personal representative of the covenantor, but brought against the person in whom the land affected by it was then vested. It was, therefore, an action which could not have been brought at common law, and was capable only of being founded on the equitable doctrine of specific performance. Kay J., before whom the matter first came, said this (2): "A contract to buy or sell land and covenants restricting the use of land though unlimited, are not void for perpetuity. In these latter cases the contracts do not run with the land, and are not binding upon an assign, unless he takes with notice. They are not properly speaking estates or interests in land, and are therefore not within the rule"; and he held that the contract did not create an interest in the land. On that last finding his decision was reversed by the Court of Appeal; but the Court of Appeal did not for a moment throw any doubt upon this—that the rule against perpetuities is a rule which is applicable to property and not a rule which is applicable to contract, and that, but for the fact that what was sought to be enforced was an interest in land which had been created by the contract, the rule against perpetuities would not have had any reference to that case. It is quite true that the judges in the Court of Appeal did use expressions to the effect that the contract was void, but such expressions as that must be taken to be used in reference to the facts of the case which was before them; and they had not to consider any such question as that which I have to consider, namely, whether an action for damages at law could have been brought upon the contract. That some such idea was in the mind of the Master of the Rolls I think appears from the passage, where he says this (3): "If then the rule as to remoteness applies to a covenant of this nature, this covenant clearly is bad as extending beyond the period allowed by the rule. Whether the rule applies or not depends upon this as it appears to me, does or does not the covenant give an interest in the land? If it is a bare or mere

(1) 20 Ch. D. 562.

(2) 20 Ch. D. 576.

(3) 20 Ch. D. 580.

personal contract it is of course not obnoxious to the rule but in that case it is impossible to see how the present appellant can be bound. He did not enter into the contract but is only a purchaser from Powell who did. If it is a mere personal contract it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land. But if it binds the land it creates an equitable interest in the land. The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase and to pay the purchase money, but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another the covenant giving the option must give that other an interest in the land." Then he goes on to decide that in that view, giving an interest in land, the contract is void or ineffectual; but the Master of the Rolls in that case distinguishes between the personal contract and that which gives an interest in land, and it is in the latter aspect only that, he holds the contract to be void. It seems to me, therefore, that, sitting here in this part of the action to administer the common law, I must hold that the covenant is a valid covenant, and that the plaintiffs are entitled to recover damages for its breach against, of course, the estate of the original covenantor.

It has been agreed on all hands that at the trial evidence should not be given as to the amount of damages, and I must therefore direct an inquiry as to the damages, and in default of admission of assets there must be the usual decree for administration of the real and personal estate of Mrs. Heather.

Solicitors: *John Hands, for William Frederick Verrall, Worthing; Waller & Co., for Bennett & Marsh, Worthing.*

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[1905 A. 1238.]

July 25, 26. *Ancient Lights—Easement—Alteration of Dominant Tenement—Increased Burden on Servient Tenement—Destruction of Easement—Action for Declaration that there is no Easement.*

The plaintiffs were the owners of a piece of land adjoining the defendant's premises. The latter consisted of a house with a backyard open to the sky. In the house there were on the ground floor two ancient lights looking into the yard. At the other end of the yard was a shed which derived light from the yard, to which one of its sides was open, and from an ancient light looking on to the plaintiffs' land. The defendant pulled down his house and rebuilt it, preserving the ancient lights. He raised the wall between his yard and the plaintiffs' land, and left in it the window to the shed and two apertures to give light to the yard. He covered in the yard so as entirely to shut out all light except that which came through the apertures. He pulled down hoardings which the plaintiffs had erected to close the apertures and the shed window, and they brought this action against him for a declaration that he was not entitled to any easement over their land for light and air :—

Held, that the defendant had increased the burden on the plaintiffs' land; it was impossible to sever the burden and say that he was still entitled to impose on the plaintiffs' land the burden which had previously existed; he could no longer maintain an action against the plaintiffs for interference with his ancient lights; he had no right which could be enforced; and therefore that the plaintiffs were entitled to the declaration they claimed.

THE plaintiffs were the owners of a piece of land which had formerly been the site of a house known as 170, King's Cross Road. The defendant in the year 1899 bought Nos. 172, 174, and 176 as building ground with a view to pulling them down and building on the site a building of a different character. No. 172, which was situated on the west side of and adjoining to the plaintiffs' premises, then consisted of a house about twenty feet deep from the south front, with an open yard at the back. The house had in it a living room on the ground floor, lighted in its north wall by a window looking into the yard; and by the side of that room was a passage lighted by a glass panel in the back

door of the house, which also opened into the yard. The window and the glass panel were called B and C in the course of the argument. At that time the light to B and C was derived from the open yard belonging to No. 172, lying to the north of them, and from other open yards belonging to Nos. 174 and 176, lying to the north-west of them. There was light also over some high buildings to the north, and light from the east, which passed over the property of the plaintiffs. There was nothing between the plaintiffs' and the defendant's property except a wall five feet high. At the north end of the yard of No. 172 was a low penthouse building—an open shed. It was unenclosed except on three sides by the walls of the yard. On the south side it was open, the penthouse roof being supported merely by uprights. In the north-east corner, in the wall between the plaintiffs' and the defendant's premises, was a small window, and the light to the shed was derived partly from its open south front and partly from this window. The defendant caused the old houses to be pulled down, and on their site he erected a new building. The yards of the three houses Nos. 172, 174, and 176 were entirely covered in, and shut in to the west, to the north, and overhead. The defendant increased the wall between the yard of No. 172 and the plaintiffs' land to six feet high, and in it he left, first, an opening which included the little window previously lighting the shed, secondly a small upright opening, and thirdly a gap about five feet high by nine feet long to give light to the yard. In rebuilding the house No. 172 he constructed two windows looking into the yard. Those two windows were called in the course of the argument B and C, because they partly corresponded with the old B and C. The only light which they now received came over the plaintiffs' land through the gap in the wall. It was admitted that B and C and the shed window were ancient lights.

In May, 1905, the plaintiffs erected on their land hoardings which prevented any access of light to the shed window and the other two apertures in the wall. The defendant pulled down the hoardings, and the plaintiffs brought this action for—(1.) a declaration that the defendant was not entitled to any easement over the plaintiffs' land for light and air in respect of any of the windows or openings or otherwise; (2.) damages for trespass; (3.) if

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necessary, an injunction to restrain the defendant from interfering with the hoardings.

George Wallace, for the plaintiffs. If the defendant had not covered in his yard we could have erected on our land buildings to a considerable height without interfering with his right to light as defined in *Colls v. Home and Colonial Stores, Ltd.* (1) By his own act he has increased the burden on the servient tenement and made it impossible for him to obtain an injunction restraining us from interference with his lights; in fact, he has destroyed his own easement. That being so, the burden of proof is on him.

Cave, K.C., and *Henry Fellows*, for the defendant. This action is brought for a declaration that we are not entitled to any easement of light, and the only question is whether our easement has been extinguished. Even if we might find it difficult to obtain an injunction supporting the easement, that does not give the plaintiffs any right to this declaration. But we submit that we should be entitled to an injunction to protect our rights. It is admitted that we have three ancient lights, which have been preserved in the new building in accordance with the law laid down in *Tapling v. Jones* (2), *Newson v. Pender* (3), and *Smith v. Baxter*. (4) Therefore we should be entitled to an injunction: *Staigh v. Burn* (5); *Barnes v. Loach*. (6)

It cannot be said that in respect of the shed window we have increased the burden on the plaintiffs' land. It is substantially the same as the ancient light which looked over that land. We have never abandoned our right, and the plaintiffs, by closing this window, have prevented us from receiving sufficient light within *Colls v. Home and Colonial Stores, Ltd.* (1) An easement cannot be forfeited by an attempt to extend the right: *Tapling v. Jones*. (2) The most that can be said is that we have lost our right of action: *Gale on Easements*, 7th ed. p. 358.

[WARRINGTON J. referred to *Gale on Easements*, 7th ed. pp. 497, 498, 506.]

(1) [1904] A. C. 179.

(2) (1865) 11 H. L. C. 290.

(3) (1884) 27 Ch. D. 43.

(4) [1900] 2 Ch. 138.

(5) (1869) L. R. 5 Ch. 163.

(6) (1879) 4 Q. B. D. 494.

Those are remarks of the original author following *Renshaw v. Bean* (1), which was overruled by *Tapling v. Jones* (2), where it was held that opening a new window did not destroy existing rights. It is an innocent act, and not an encroachment. We have only given up so much of our light as we did not require. We have done nothing to shew that we intended to give up the whole of our rights. If we removed the building which now covers our yard the plaintiffs would have no case.

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George Wallace was not called upon to argue further, and he therefore elected to call no witnesses.

WARRINGTON J. stated the facts, and continued:—The first question is, What is the burden in the case of light which is now cast upon the servient tenement? That burden seems to me, after the decision in the case of *Colls v. Home and Colonial Stores, Ltd.* (3), to be this: that the owner of the servient tenement is prevented from erecting on his land a building in such a situation and of such a height and dimensions as will by interfering with the light passing through the ancient apertures of the house on the dominant tenement render that house substantially uncomfortable. I think that is an accurate statement of the effect of the recent decision in the House of Lords on the question of what is the burden cast upon the servient tenement. Now has what has taken place here materially increased that burden on the servient tenement? If it has increased that burden, is the effect of that increase either to destroy the easement, or, which would come to the same thing, prevent the owner of the dominant tenement from recovering damages or obtaining an injunction, in other words, from enforcing any alleged right to light by means of an action? Now in my opinion, and I find this as a fact, beyond question the alteration in the dominant tenement has, so far as the door and the window to the living room are concerned (B and C), increased the burden cast on the servient tenement, understood in the way in which I have said it ought to be understood, and for this reason: The defendant having shut out from his window all the light

(1) (1852) 18 Q. B. 112.

(2) 11 H. L. C. 290.

(3) [1904] A. C. 179.

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from the west, which previously he enjoyed, all the light from the north, the whole of the vertical light from the sky, and all the light from the east except that which comes through the only aperture which is material, that is the gap, has brought about this effect, that a building erected on the servient tenement which, before the alteration of the dominant tenement, would not have been a legal interference with the claim of the dominant tenement would now be such an interference. On the evidence I have heard I think there can be no doubt whatever that that is the result of the alteration which the defendant has made. In fact the thing hardly wants evidence; it speaks for itself. In the present state of the premises a building, say only eight or nine feet high, would materially interfere with the comfort of the room in respect of the light derived from so much of the new window as is coincident with the old one, whereas such a building if erected on the servient tenement before the alteration would not have caused such an interference. Now it seems to me that that is an increase, a material increase, a substantial increase, in the burden cast upon the servient tenement.

With regard to the little window which previously lighted the shed I come to the same conclusion, though the case there is not quite so plain as it is in the case of the window and door. The result of the alterations which the owner of the dominant tenement has made has been completely to shut out the light which previously came from the south into that open shed, and therefore to render an interference with the little window which before the alterations would not have amounted to an obstruction, in the legal sense, of the light necessary for the enjoyment of that shed, one which since the alterations would amount to such an obstruction.

Now is it possible to so sever that increased burden as to preserve to the defendant that to which he was entitled, and to impose upon the servient tenement that obligation only which was previously imposed upon it, without the obligation attempted to be imposed upon it by the alterations? In a case like this it seems to me absolutely impossible. It seems to me that it is beyond human ingenuity to say what may be done by the owner

of the servient tenement on his land which would not be a nuisance to so much of the old light as still passed through the new windows under the existing altered circumstances brought about by the defendant himself. Looking at the altered circumstances, it would be impossible to say what the owner of the servient tenement could do without infringing that obligation to which alone he is properly subject. It seems to me that the owner of the tenement has done that which has rendered it impossible to make the necessary severance, and, that being so, he could not now maintain any action for an interference, even an action occasioned by the total blocking up of the apertures which have been left by himself. If that is so, then, whether it be that his act has technically destroyed the easement, or whether it be that his act has rendered it impossible for him to maintain an action for damages or for an injunction for interference with his ancient lights, it matters really not at all; the result is that he has no right to light which is capable of being enforced by action in this Court, and, therefore, that he has no right to light at all. I think, therefore, that I must make the declaration asked by the plaintiffs, omitting the words "or otherwise."

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Solicitors: *Brash Wheeler & Chambers; Ravenscroft, Woodward & Co.*

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Aug. 3, 9.

Copyright—Equitable Assignment—Author and Publisher—Story not in Existence—Complete Copyright—Agreement to assign—“Assigns”—“Employment”—“Any Book whatsoever”—Copyright Act, 1842 (5 & 6 Vict. c. 45), ss. 2, 18.

The plaintiffs, a firm of publishers, agreed with an author to pay him 200*l.* for the complete copyright of a story to be written on the lines of a synopsis already approved by them, containing not less than 80,000 words, copy to be delivered within six months. The story was completed and a typewritten copy delivered to the plaintiffs within the specified time. Pending a dispute about an alleged deficiency in the number of words, the plaintiffs withheld payment of part of the 200*l.*, and in the interval the author sold the volume rights in the story to the defendant, a purchaser for value without notice. The plaintiffs published the story in volume form, and were duly registered as proprietors of the copyright in the book. They now sought to restrain the defendant from publishing the story:—

Held, that the agreement constituted a good equitable assignment of the complete copyright in the story, when written, to the plaintiffs, who thereby became “assigns” of the author within the definition contained in s. 2 of the Copyright Act, 1842; and that the plaintiffs were entitled to an injunction, notwithstanding that the case was also a case of employment falling under s. 18 of the Act, under which the plaintiffs could not have succeeded, inasmuch as the story had not as yet been paid for in full by them as required by that section.

The words “any book whatsoever” in s. 18 are not limited to any book ejusdem generis with the books or works previously enumerated, but are to be construed generally as applying to any book to be composed on a bargain between any publisher and any author.

There is nothing in the Act which prohibits the general law concerning the assignment of copyright from being applied to cases which fall within the class of cases contemplated by, and are capable of being determined under, s. 18 of the Act.

WITNESS ACTION.

The plaintiffs were a limited company registered under the Companies Acts, and carried on business as publishers. The defendant also carried on business as a publisher.

On December 2, 1904, the plaintiffs wrote to Mr. M. P. Shiel, an author, acknowledging the receipt of the synopsis of a new

story by him, and saying that they thought this new serial story was more suited for serial purposes than a former one to which they alluded; and on December 6 they wrote again saying that they thought the transaction should go through Mr. Watt, Mr. Shiel's agent, and that they had written to him making an offer for "The Lost Viol" (which was the name of the new story mentioned in their previous letter) on the terms of their last transaction, and that they would be glad to hear that Mr. Shiel had decided to accept the commission. The last transaction referred to in this letter related to a book called "Evil that Men Do," in respect of which the plaintiffs had paid Mr. Shiel 160*l.* for the serial rights, and a further 40*l.* for the volume rights.

In the letter of December 6, 1904, to Mr. Watt, the plaintiffs wrote as follows: "Mr. Shiel has shewn us a synopsis of a story entitled 'The Lost Viol' . . . and we have pleasure in offering two hundred pounds for the complete copyright of a story containing not less than 80,000 words, on the lines of the said synopsis, copy to be delivered within six months if possible. We shall be glad if you will submit this proposal to Mr. Shiel, and let us hear if he is agreeable to accept it." To this letter Mr. Watt replied on December 20, saying: "I understand Mr. Shiel is willing to accept your offer of the sum of 200*l.* (two hundred pounds) for the copyright of a new novel . . . provided that you will pay down on the signing of the agreement 60*l.* of the above mentioned amount. . . ." In reply the plaintiffs demurred to making an immediate cash payment unless Mr. Shiel was willing to allow discount. To this Mr. Shiel agreed, and on January 5, 1905, signed the following receipt: "Received from Ward, Lock & Co., Limited, the sum of fifty-seven pounds in payment on account of copyright of new story by M. P. Shiel (to be delivered) at present entitled 'The Lost Viol.'"

On March 23, 1905, a complete typewritten copy of the story was delivered to the plaintiffs, who on April 1 paid a further sum of 100*l.* to Mr. Watt. Subsequently the plaintiffs alleged that the story contained only 70,000 words, and withheld 40*l.*, the balance of the amount they had agreed to pay, pending some arrangement with regard to the alleged deficiency. After some

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KEKEWICH J. negotiation Mr. Shiel, regarding his contract with the plaintiffs
 1906 as avoided, sold the volume rights for 75*l.* to the defendant, who
 WARD, LOCK & Co., knew nothing about the above-mentioned contract with the
 LIMITED plaintiffs.
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On August 11, 1905, the plaintiffs published the story in volume form, and on the next day were duly registered as proprietors of the copyright in the book under the Copyright Act, 1842.

The defendant was intending to publish the story in volume form, and accordingly the plaintiffs commenced this action for an injunction to restrain him from so doing.

Stewart-Smith, K.C., and *Rostron*, for the plaintiffs. We submit that these letters amount to an actual assignment of the copyright. They are more than an agreement to assign when the copyright should come into existence, which would be when the work was written. They are an assignment of the copyright in a work to be written, and as soon as it is written the assignment is complete, so that in January, 1905, there was a complete assignment. The interest of an author may become vested in an assign before publication: *Cocks v. Purday*. (1) It is settled that after publication the assignment of the author's rights must be in writing, but there is no authority which decides that before publication they must be assigned in writing. The definition of "assigns" in s. 2 (2) of the Copyright Act, 1842, contemplates the assignment of the rights of the author before publication, and the plaintiffs come directly under that definition. It is sometimes said that a document such as the letter of December 6 is only an agreement to assign and not an assignment, and some observations of Lord Westbury in *Holroyd v. Marshall* (3) seem to have been misunderstood, as was pointed out in *Tailby v. Official Receiver*. (4) This is not an executory contract, but an assignment of property when it comes into

(1) (1848) 5 C. B. 860.

(2) Sect. 2 provides that "the word 'assigns' shall be construed to mean and include every person in whom the interest of an author in copyright shall be vested, whether derived from such author before or

after the publication of any book, and whether acquired by sale, gift, bequest, or by operation of law, or otherwise;"

(3) (1862) 10 H. L. C. 191.

(4) (1888) 13 App. Cas. 523, 531, 535, 545.

existence. If in *Tailby v. Official Receiver* (1) the document had been held to be an agreement to assign instead of an actual assignment it would not have been good against the Official Receiver. The result of that decision is that the book debts became vested in the assignee as soon as they arose. That applies in this case. The plaintiffs were assigns of the author before publication, and they acquired the copyright as soon as the work was finished.

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It is said that s. 18 (2) of the Act covers this case, but that section

(1) 13 App. Cas. 523, 531, 535, 545.

(2) Sect. 18 provides as follows :
“When any publisher or other person shall, before or at the time of the passing of this Act, have projected, conducted, and carried on, or shall hereafter project, conduct, and carry on, or be the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and shall have employed or shall employ any persons to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, and such work, volumes, parts, essays, articles, or portions shall have been or shall hereafter be composed under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher, or conductor, and paid for by such proprietor, projector, publisher, or conductor, the copyright in every such encyclopædia, review, magazine, periodical work, and work published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such proprietor, projector, publisher, or other conductor, who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of copyright therein

as is given to the authors of books by this Act; except only that in the case of essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works of a like nature, after the term of twenty-eight years from the first publication thereof respectively the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by this Act: provided always, that during the term of twenty-eight years the said proprietor, projector, publisher, or conductor shall not publish any such essay, article, or portion separately or singly without the consent previously obtained of the author thereof, or his assigns: provided also, that nothing herein contained shall alter or affect the right of any person who shall have been or who shall be so employed as aforesaid to publish any such his composition in a separate form, who by any contract, express or implied, may have reserved or may hereafter reserve to himself such right; but every author reserving, retaining, or having such right shall be entitled to the copyright in such composition when published in a separate form, according to this Act, without prejudice to the right of such proprietor, projector, publisher, or conductor as aforesaid.”

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points to a serial publication in parts and at different periods, and it does not apply here, where there is a complete contract for sale of the copyright outside the section and the work is not in the nature of a serial publication or an encyclopædia. There was no employment of the author in this case such as there was in *Lawrence and Bullen v. Aflalo*. (1) The relationship between the author and the plaintiffs in this case was that of assignor and assignee, not that of employed and employer. The plaintiffs will have to pay in full or adjust the payment, but not as a condition precedent to the copyright vesting. This is just as much a sale as if he had written the book before the negotiations with the plaintiffs.

Further, looking at the section as a whole, we submit that it was not intended to apply to single books by a single author. The words "any book whatsoever" must be read as meaning "any book of the kind or nature aforesaid," and not any book generally, and that view is aided by the fact that the words do not occur again in the later part of the section. The section is needed to oust the rights of the author, and is intended for the protection of the publisher. "Book" means one of a series of books or volumes projected by the publisher, and the section only applies to a publisher who projects, conducts, and carries on works of that class. The complete copyright being in the plaintiffs by virtue of the assignment, and the story having been handed over to them, the author had nothing to assign to the defendant, who claims the volume rights, and, that being so, the plaintiffs are entitled to the injunction which they ask.

Ingpen, K.C., and *Warwick Draper*, for the defendant. It is not disputed that there may be an equitable assignment of copyright, but the question is whether there has been in fact such an equitable assignment in this case. We submit that there has not. In equity, property does not vest in the purchaser until the consideration has been paid, and if the purchaser fails to perform his part there is no transfer of the property. That seems to be supported by the remarks of Lord Westbury in *Holroyd v. Marshall*. (2)

[KEKEWICH J. I do not think that Lord Westbury meant

(1) [1904] A. C. 17.

(2) 10 H. L. C. 191.

that the passing of the beneficial interest was conditional on the receipt of the purchase-money.]

The property does not vest in the purchaser absolutely. The plaintiffs must shew that they are the absolute proprietors of the copyright before they bring their action. They are not absolute proprietors until payment, because until then the contract may be rescinded. The consideration not having passed, this is not such an equitable assignment as Lord Macnaghten was considering in his speech in *Tailby v. Official Receiver*. (1)

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This case is covered by s. 18, which is the only section of the Copyright Act dealing with the case of copyright in a work the creation of which has not yet taken place. That section imposes three conditions—namely, (1.) the composer must be employed by the publisher; (2.) the copyright must belong to the publisher; and (3.) the work must be paid for by the publisher.

The repealed Bakehouses Regulation Act, 1863 (26 & 27 Vict. c. 40), contained a definition of employment, and in *Ex parte Branfill* (2) the question of whether a person was in the permanent employ of a solicitor came before the Court, but there are no direct decisions on the meaning of the word “employment” in this section. There are, however, three cases of contract between publisher and author which shew incidentally what was considered sufficient employment. In *Bishop of Hereford v. Griffin* (3) the article was written at the request of the proprietors of the Encyclopædia, and it was assumed that there had been an employment within s. 18. Again, in *Walter v. Howe* (4) it was not disputed that mere payment for literary services for a composition to be made was an employment within the section, and in *Aflalo v. Lawrence and Bullen* (5) it was assumed that there was employment within the section. Employment, therefore, does not mean that the author must be in the general service of the publisher or proprietor; a mere request by the latter to the author to write a work is sufficient. Here there was a projection of the work and a sufficient

(1) 13 App. Cas. 523, 547–8.

(2) (1892) 40 W. R. 670.

(3) (1848) 16 Sim. 190.

(4) (1881) 17 Ch. D. 708.

(5) [1902] 1 Ch. 264; on appeal,
[1903] 1 Ch. 318; [1904] A. C. 17.

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employment to bring the case within the section ; but there has not been payment in full, and actual payment to the author by the publisher is a necessary condition for the vesting of the copyright in the publisher of a work which is to be composed : *Richardson v. Gilbert* (1) ; *Brown v. Cooke*. (2) The copyright, therefore, has not vested in the plaintiffs, and they are not entitled to succeed.

Sect. 18 is not restricted to works in a serial form or to encyclopædias : *Lawrence and Bullen v. Aflalo*. (3) The exceptions referring to the author shew that the Legislature meant it to apply to the copyright in any works which have been composed at the request of the publisher. The words "any book whatsoever" are very wide, and must apply to a single book such as this.

Assuming, however, that this case is not within s. 18, then the plaintiffs are not entitled to succeed against the defendant, because the equities being equal the law must prevail, and at law there can be no assignment of a thing which does not exist : *Sweet v. Shaw* (4) ; and an assignment of copyright must be in writing : *Leyland v. Stewart*. (5) The defendant is an innocent purchaser for value and has vested in him the legal interest in the volume rights, and the plaintiffs are only at most entitled to an interest under a contract which is not yet complete.

KEKEWICH J. The plaintiffs were minded to make a bargain with an author, Mr. Shiel, respecting a book which he proposed to write, to be called "The Lost Viol." They had on a former occasion made a bargain with him respecting a book called "Evil that Men Do," and that bargain had proceeded upon certain terms respecting the production of the book as a serial and also as an entire volume. The exact terms I do not think it necessary to further discuss. It seems that the plaintiffs in the first instance proposed to acquire the copyright in "The Lost Viol" on similar terms, because they actually wrote a letter to Mr. Shiel himself, saying they had made an offer for "The Lost Viol" on the terms of the last transaction.

(1) (1851) 20 L. J. (Ch.) 553.

(3) [1904] A. C. 17.

(2) (1846) 16 L. J. (Ch.) 140 ; 11

(4) (1839) 8 L. J. (Ch.) 216.

Jur. 77.

(5) (1876) 4 Ch. D. 419.

On December 6, 1904, they wrote this letter to Mr. Watt KEKEWICH
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— [His Lordship read the letter, and continued :—], a very different offer from that which they said they were going to make, and an offer standing by itself as simple and intelligible as any that could be made by one man to another. They had seen the synopsis, the sketch or skeleton of the story, and they trusted Mr. Shiel to fill in the body and the spirit, and were prepared on the footing of his doing that, if possible, within six months to pay him 200*l*. For what? For the complete copyright. There is no question about that; no question of serial production; no question of volume rights: it was the complete copyright in the story. If Mr. Watt, as the author's agent, or Mr. Shiel himself, had said in reply "I accept the terms contained in your letter of December 6," there would have been no question but that would have been a complete acceptance binding on both parties; and really he did do so. The letter accepting the terms, which was not written until December 20, contained a condition relating to payment in advance of a small part of the 200*l*. which the plaintiffs were in the first instance not disposed to make, but, after a little further negotiation, they did make it on the terms of being allowed a discount; and the payment in advance was made. It seems to me that, grouping all these letters together, there is, not on December 20, but ultimately, a complete clean acceptance of the terms offered by the letter of December 6—a complete contract.

That concludes the whole bargain. What is the effect of that? The book was not only not in existence, but was known to both parties not to be in existence, and it was known to both parties that it could not be in existence for at any rate some months. Does that contract under those circumstances constitute an assignment within the Act? In the first place there are no words of assignment; but those are not necessary. An agreement to assign, in matters of this kind, is quite as good as a direct assignment in words, is enforceable in equity, and, as between business men, is complete. I do not think that any difficulty arises, therefore, from the fact that there are no words purporting to be an operative assignment.

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A difficulty, however, arises from the fact that the book was not in existence, and could not come into existence for some time. I entertain no doubt myself that there can be an assignment of an article to be produced when it shall be produced—book debts, for instance, and many other things of a like nature: I was going to say a picture when painted, but that is too close to this case to be a good illustration—and my opinion has been much supported during the argument by passages read from the case of *Tailby v. Official Receiver*. (1) I have no doubt that there can be an assignment in that way in the form of an agreement to assign. Why should not that come within s. 2 of the Copyright Act, 1842? Of course, such an assignment as is there contemplated is an assignment of the copyright under the Act; I have nothing to do with the common law right at all for this purpose. The word “assigns” is construed in s. 2 of the Act; it is to “mean and include every person in whom the interest of an author in copyright shall be vested, whether derived from such author before or after the publication of any book, and whether acquired by sale, gift, bequest, or by operation of law, or otherwise.” If I am right in my conclusion that this correspondence constitutes a contract vesting the copyright in the plaintiffs, they would be brought immediately within the word “assigns” as thus construed. They acquired it by sale, that is to say, by purchase on their part. They were to pay 200*l*. Whether they actually pay or not is immaterial. They are liable for the money, and they acquire the author’s interest in the copyright by sale, that is, a sale by the author, and a purchase on their part. If it stopped there, I see no reason for doubting that there would be a good assignment within the Act, and the plaintiffs would be entitled to succeed as against the defendant, who claims through the author, as to anything which has been assigned to them. Before passing on, let me inquire what has been assigned to them? On that I can have no hesitation for a moment. They stipulated to give 200*l*. for the complete copyright. It appears that they did contemplate the production of this book in a serial form. They did not fulfil that intention. They thought it better not to do so. If I am right, they were masters of the position.

(1) 13 App. Cas. 523.

They might do as they pleased, and they did not publish it in serial form. I cannot see my way to cutting down the words "complete copyright" so as to include any one form or any number of forms and exclude any others. It seems to me that the writer of that letter used words which were of the most comprehensive description, and they have only one meaning, namely, that they were to have the entire copyright. If that be so, the allegation of the defendant that he has purchased in good faith for money the volume rights from the author goes for nothing. The author had nothing to assign except the right under the contract to receive 200*l.*, or whatever else was remaining to be paid. It is not said that he has assigned that, and it is impossible in this action between the present plaintiffs and the defendant to say whether anything is owing to the author or not. On that I will say something presently. I am taking this part of the case simply as it stands.

Then come the further questions—whether the case also falls within s. 18, and, if so, whether, notwithstanding that there might properly be, in law and in fact, an assignment of the copyright in a book yet to be produced, the section amounts to a legislative statement that when one is dealing with a book not yet produced the transaction is to be governed by s. 18, and the law concerning assignment is not to be applied to such a case. Sect. 18 is very awkwardly worded in this sense, that there are a great many words used where, apparently, a few would have been sufficient, and the collocation of them is not at all easy to follow. The short purport is this. The Legislature contemplating that a publisher might be disposed to make a bargain with an intended author for the composition by him of a work, and that the publisher should pay him for that work when composed, made a provision for circumstances of that character. No doubt the section was dictated by a knowledge of what occurs in the trade. It is well known to us all that many works are composed, particularly articles in encyclopædias and other periodical works, on those terms, and so an elaborate provision is made for that. On first reading it the section seems to provide only for such a case as a periodical work. It begins by enumerating encyclopædia, review, magazine,

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periodical work, but it goes on to say "or any book whatsoever." One may guess that those words were introduced by amendment at some time without sufficient regard to the context, but it is impossible to my mind to cut the words down. It has been argued that they may mean any book whatsoever ejusdem generis—of the same kind as those before mentioned. I think it would puzzle anyone to say what is ejusdem generis with encyclopædia, review, magazine, periodical work, or works published in a series of books or parts, except this, that a single volume would not be ejusdem generis certainly. Yet the Act says "or any book whatsoever": a single volume is just the "any book whatsoever"; it just fills up and corresponds to that description; it takes more in a good deal, but I cannot conceive that any limitation ought to be put upon that standing alone. It is said that the notion of limitation derives support from the latter part of the section. It is true that the latter part of the section does not follow with any accuracy the earlier part to which it is supposed to refer and to which it does really refer; but still I find "every volume" there connected with "part, essay, article, and portion so composed," and I cannot myself see that the latter part of the section creates any difficulty in the general construction of the earlier part. Other difficulties are suggested. It is said that this does not apply to every publisher. The section begins with "When any publisher." How can I test it? It is true that this "any publisher" is spoken of as projecting, conducting, and carrying on, or being the proprietor of something. Again, he is to be the projector, conductor, and to be carrying on, or be the proprietor of "any book whatsoever," so that really there is very nearly an exhaustive description of a publisher. So long as he conducts any business at all in the publishing line it seems to me he is a publisher within this section. Again, an argument was addressed to me that this only applies to books composed by a number of authors. I see no justification for that argument at all. Therefore it seems to me that the section applies to any book that may be composed on a bargain between any publisher and any author. To bring a particular case within the section three things must be observed. In the first place, there must be

an employment by the publisher of the composer; secondly, that employment must be on the terms that the copyright shall belong to the publisher; and thirdly, in order to give him the copyright under the section, it must be paid for. Here it seems to me that I might well hold that the plaintiffs employed the author to compose this book called "The Lost Viol." They knew of the existence of the synopsis; they asked him to write the book on those lines; and they promised to pay for the book when written on those lines. It does not seem to me worth while to consult dictionaries, still less to find out how the word "employment" has been used in other cases of an entirely different character. I cannot help thinking that this is equivalent to employment, and that the case so far falls within the Act. If it is a case of employment, there can be no doubt, in my view, that the employment was made on the terms of the copyright belonging to the employer, that is to say, to the publisher. I will not read again the words of the letter of December 6, which stipulated for that in distinct terms. Then, has it been paid for? Certainly not. A question has arisen between the plaintiffs and the author by reason of the work not coming up to the stipulated length, and the result is that they have not paid him in full. They would be willing to pay something more; it may be they have not been willing to pay him enough, it may be that they have been generous, but they have not paid him in full; and it has not been determined what the payment in full is to be. I have not the author here, so I cannot decide what they ought to pay; but it has not been paid, and the result is that the copyright does not at present belong to the proprietor, the publisher, if the case falls within that section, and I see no reason why it should not fall within that section, which seems to me to meet the case exactly standing alone. But then, as I have already said, the letters amount to an assignment, and so there arises this difficulty: Here is a case which might fairly be described as an assignment, but I also find a special provision in the Act of Parliament for cases of a certain class, and this case falls within that class; ought I to consider that this is an assignment when it could be disposed of and brought within s. 18 and the rights could be determined according to

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KEKEWICH that section? That is a question which has somewhat exercised
J. my mind. I think the answer to it is this: It might come within
1906 either, and I do not find any prohibitive clause in the Act. Recogn-
WARD, LOCK izing as I do the right of the author to assign the copyright in a
& Co., book which is not yet in existence, I do not find him prohibited from
LIMITED exercising that right by this statutory provision dealing with cases
v. which are of the same character and which could enable a bargain
LONG. to be made on those terms. I think the sound conclusion is that
s. 18 does not exclude rights by assignment in such a case, very much for this reason, that s. 18 only contemplates the copyright being vested in the publisher on payment when the contract was that it should belong to him; and one has to go back to the contract for that purpose. The section in no wise provides for the case where the contract was that the copyright should not belong to him, and yet there might have been employment of the kind specified. In such a case one would have to fall back upon the bargain, which might be a partial assignment, as it was insisted that, in fact and in truth, this was—that is to say, the assignment of the copyright, not as a whole, but partially and for certain purposes.

Be that as it may, I find no prohibition of assignment; therefore I think I must come back to this: What did the parties intend? I am dealing here with a publisher and an author. I think it would be paying them too great a compliment to suppose they really understood the Copyright Act, because I am not sure that any man does that, but at any rate they must be taken to be generally cognizant of the provisions of this Act and the publisher's and author's rights under it. I turn to this letter of December 6, and I find that the plaintiffs stipulate for the complete copyright of the story, but there is nothing about employment in words, although the transaction, as I have said, might be treated as one of employment. What the plaintiffs in so many words offered to buy was the complete copyright. After much reflection, and having had the advantage of long argument, I cannot myself believe that these gentlemen did not intend precisely what they said here, that the plaintiffs were to have the complete copyright at once without any more, or any conditions such as are contained in s. 18 with regard to service

of that kind. That seems to be the solution of a considerable difficulty. KEKEWICH
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In my view it is the solution according to the intention of the parties as expressed by themselves. The result of that is that the defendant is wrong. He has unfortunately purchased from the author the volume rights when the author had no volume rights to sell. Therefore, between the defendant and the plaintiffs, the defendant is simply an infringer or trespasser if he attempts to publish this book in any shape whatever, and the plaintiffs are entitled to an injunction. But I must not be understood as indicating the slightest opinion as to the rights between the plaintiffs and the author on the one hand or between the defendant and the author on the other. I am not competent in this action to decide anything about that, and it is better that I should say nothing at all. I shall not grant an injunction which says anything about the volume form. It will be an injunction to restrain the defendant, his servants, agents and workmen, from publishing, printing, selling and delivering or otherwise disposing of, or from causing or knowingly permitting to be published, printed, sold, delivered or otherwise disposed of, any copy or copies of "The Lost Viol," by M. P. Shiel. 1906
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Solicitors : *Ashurst, Morris, Crisp & Co.; Rivington & Son.*

R. M.

C. A.

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July 30, 31;

Aug. 1, 8.

MANCHESTER CORPORATION *v.* NEW MOSS COLLIERY,
LIMITED.

[1904 M. 2225.]

Mines—Waterworks—Reservoir—Lands purchased by Agreement for the Purposes of Waterworks—Mines and Minerals purchased together with Lands—Right to support from Minerals under adjacent Land—Limit of Forty Yards—Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 18—27.

Where land is acquired by agreement for the purposes of constructing waterworks under a special Act which incorporates the Waterworks Clauses Act, 1847, and the undertakers purchase all the mines and minerals under the land so taken, they acquire all the rights of support from the minerals under adjacent lands which the vendor had at common law at the time the land was taken. In such a case ss. 18 to 27 of the Waterworks Clauses Act do not take away the common law right of support from minerals under adjacent lands, or give the owners of such minerals any greater right to work them so as to let down the surface of the land taken, as against the undertakers, than they had against the vendor before the land was taken.

In such a case, and *semble* in all cases, these sections have no reference to lands outside the limit of forty yards, or other limit prescribed by the special Act. The rights of the undertakers and the owners of such minerals in relation to their working are governed by the common law.

In 1875 a corporation purchased land from S., and adjoining land from T., for the purpose of constructing a reservoir in connection with their waterworks. At the date of the conveyances the corporation had power to purchase land by agreement for the purposes of their waterworks generally under various Acts, but the compulsory powers originally given by those Acts did not apply to the lands in question, and had lapsed. An Act empowering the corporation to construct the reservoir for the purposes of which the land was bought was passed after the conveyances. The conveyance from S. reserved the minerals with power to work without making compensation for injury to the surface. The conveyance from T. included all minerals and all his right and interest in the land. The reservoir was constructed partly on S. lands and partly on T. lands. The defendants, who were lessees from S. of the minerals under the lands sold by him to the corporation and other lands, gave notice to the corporation of their intention to work the coal adjacent to and under the lands bought from S. The corporation gave no counter-notice of their willingness to pay compensation. The defendants continued their workings, and caused subsidence of the land bought from T. This was in part caused by

workings more than forty yards from the land injured. The corporation brought this action to restrain the defendants from working so as to let down the surface :—

Held, that the corporation, having bought T.'s land with the minerals, had acquired the same common law right to support from the minerals under adjacent lands as T. had enjoyed ; and that there was nothing in the Waterworks Clauses Act to take this right away. Injunction granted.

Decision of Farwell J., [1906] 1 Ch. 278, reversed.

C. A.

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THE Manchester Corporation brought this action to restrain the defendants from working coal so as to cause damage to the land of the plaintiffs in Audenshaw and other townships in Lancashire. The land in question formed part of the site on which the corporation had constructed, for the purposes of their waterworks, a large reservoir known as the Audenshaw reservoir. It had been acquired by agreement from John Taylor, and had been conveyed by him to the corporation by a deed dated July 1, 1875, which contained a recital that the corporation had agreed to purchase the land pursuant to all the powers enabling them in that behalf, including particularly the powers contained in the Manchester Corporation Waterworks Act, 1847, wherewith was incorporated the Lands Clauses Consolidation Act, 1845, and the Waterworks Clauses Act, 1847, and conveyed the land “together with all and singular ways mines, minerals, delphs, quarries easements privileges and appurtenances to the lands and hereditaments hereinbefore described belonging or in any wise appertaining.”

The corporation had acquired the greater part of the site of the reservoir from the Earl of Stamford and Warrington, and this land had been conveyed to them by a deed dated January 13, 1875, which contained a similar recital, but reserved unto the Earl (but without prejudice to the clauses in that behalf contained in the Waterworks Clauses Act, 1847) all mines of coal and cannel and such clay, minerals, and other strata as it might be necessary or expedient to remove in order to get such coal or cannel, and full powers to work the same “without making compensation for any damage done to the said land or buildings reservoir or works for the time being thereon by reason of the getting or working such mines under the same or any other hereditaments.”

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The time for acquiring land under the compulsory powers of the Manchester Corporation Waterworks Act, 1847, had expired long before the date of these conveyances, and it did not give the corporation power to construct the Audenshaw reservoir.

Later in the year 1875 the corporation obtained another special Waterworks Act, and the Audenshaw reservoir was in fact constructed under the powers of this Act. Both the Stamford land and the Taylor land were specified in the schedule to this Act; a confirmatory conveyance was executed by Lord Stamford after the passing of this Act, but no such conveyance was executed by Taylor. When the reservoir was completed part thereof, including part of the northern embankment, stood on the Taylor land. The reservoir had been completed more than twenty years before the commencement of this action.

The defendants were lessees of the coal under lands of Lord Stamford, including the coal under the reservoir. On two occasions, in 1899 and 1903, the defendants had given notice to the corporation under the Waterworks Clauses Act of their intention to work certain mines adjacent to and under the reservoir. The plaintiffs did not in either case give a counter-notice of their willingness to pay compensation.

The defendants continued to work the coal under the Stamford lands, and thereby caused subsidence of the Taylor land and consequent damage. It was proved that the damage was caused partly by workings within, and partly by workings outside, the limit of forty yards prescribed by the Waterworks Clauses Act, 1847, and that the subsidence would have taken place to an equal extent if the reservoir and embankment had not been erected.

Farwell J. refused to grant the injunction (1), and the plaintiffs appealed.

Sir R. B. Finlay, K.C., Jenkins, K.C., and H. F. Moulton, for the appellants. There is nothing in the Waterworks Clauses Act which deprives the plaintiffs of the right to support with respect to the Taylor land which they would otherwise have had at common law. The conveyances of the Taylor land are not on

(1) [1906] 1 Ch. 278,

the same footing as if they had been obtained after the special Act had been passed, and on this point we say the finding of the judge in the Court below was wrong. If the provisions of ss. 23 and 27 of the Waterworks Clauses Act are read side by side, it is clear that they provide for the same state of circumstances "as if this Act and the special Act had not been passed." These provisions decide this case. The only right the adjoining mineowner has is to work his mines in the same way "as if this Act had not been passed." The defendants are claiming a right to work their mines more freely than they otherwise could have done by virtue of the Act. Even if a counter-notice under s. 23 of their willingness to treat for compensation is not given, still the mineowners' rights are only the same, as far as working is concerned, "as if this Act and the special Act had not been passed." Farwell J. has decided that the Taylor land has lost its right to lateral support, and that the Stamford lessees have greater rights by virtue of the passing of the Waterworks Clauses Act. This is inconsistent with the wording of ss. 23 and 27.

The Taylor land, at the time it was acquired, had a common law right or incident of support from the land of the adjoining owners, and there is nothing in the Waterworks Clauses Act to take away this common law right. The only right conferred on the adjoining owner is to work his mines as if the Act had not been passed.

Pountney v. Clayton (1) and *Consett Waterworks Co. v. Ritson* (2) must be read together, but there is nothing in either of them to justify the conclusion arrived at by Farwell J.

[ROMER L.J. As at present advised, I cannot see what those authorities have to do with this case. The onus is on the defendants to shew that the Waterworks Clauses Act has taken away from the Taylor land its common law rights.]

There is a dictum of some weight by Cockburn C.J. in *Great Western Ry. Co. v. Fletcher* (3) to which reference should be made. Our contention may be summarized as a claim to a right of support as incident to this land, with which the

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(1) (1883) 11 Q. B. D. 820.

(2) (1889) 22 Q. B. D. 318.

(3) (1860) 5 H. & N. 689, 698.

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Waterworks Clauses Act has nothing to do. The cases cited in the Court below were cases in which the question was between undertakers who had purchased land from a vendor who reserved so much of the land below as was minerals; in this case the plaintiffs acquired the Taylor land with the minerals and all its common law rights.

Upjohn, K.C., Roskill, K.C., and MacSwinney, for the respondents. The Taylor land and the surface of the Stamford land were acquired by the plaintiffs as waterworks "undertakers" for the purposes authorized by their special Act and in exercise of statutory powers, and the fact that these lands were not taken compulsorily makes no difference as to the rights of the parties, which from the time of the acquisition are regulated by the fasciculus of ss. 18 to 27. These sections contain a complete, exclusive, and exhaustive statement of the rights and obligations of the "undertakers" and the various owners of mines in the neighbourhood, and substitute a statutory code for the common law. If the conveyance of the Taylor land of July 1, 1875, is examined, it is clear that this land must have been acquired by virtue of the Waterworks Clauses Act, and therefore it is not possible for the appellants to contend that this land is not part of the waterworks undertaking, and therefore not bound by the sections of the Waterworks Clauses Act.

[ROMER L.J. The fact that this land was acquired for waterworks purposes is not inconsistent with the fact that all Taylor's rights in this land were included in this conveyance. What you have to make out is that the common law right to support is gone in favour of the adjoining owner.]

Sects. 22 and 23 are in perfectly general terms, and there is nothing to limit their provisions to compulsory acquisition of land or compulsory purchases.

Consett Waterworks Co. v. Ritson (1) shews that there is no difference between a railway company and a waterworks company with respect to the statutory mining code. *Great Western Ry. Co. v. Bennett* (2) shews that it was the intention of the Legislature to create a new code, and that where the surface is taken compulsorily there is no right to support. *Holliday v.*

(1) 22 Q. B. D. 318, 329.

(2) (1867) L. R. 2 H. L. 27.

Wakefield Corporation (1) states the rights, and the only rights, which the undertakers have.

[ROMER L.J. Those cases have nothing whatever to do with the common law right of support.]

In re Lord Gerard and London and North Western Ry. Co. (2) is a clear authority that the Act applies and excludes common law rights. In *Ruabon Brick and Terra Cotta Co. v. Great Western Ry. Co.* (3) Lindley L.J. expressly says that the point to consider was whether the rights of the parties depended upon the ordinary principles of real property law or upon the statutory enactments of the Railways Clauses Consolidation Act, 1845, and the Court came to the conclusion that the rights of the parties were governed by the statutory code; and *Glasgow Corporation v. Farie* (4) shews that the question is the same with regard to minerals which are not taken at all. The exact point that arises in the present case arose in *Pountney v. Clayton* (5), and was decided in our favour.

To hold that the common law applies outside the statutory area will be to make the statutory code illusory, and will produce confusion; there would then be the statutory code within the forty yards area, and outside that area the law as enunciated by *Caledonian Ry. Co. v. Sprot*. (6)

Sect. 22 of the Waterworks Clauses Act begins "Except where otherwise provided by agreement." It is impossible, therefore, to contend that the mining clauses only apply to land compulsorily taken.

[COZENS-HARDY L.J. Do the clauses apply where there are no compulsory powers at all? Sect. 6 supplies an argument that they do not. They do apply where there are compulsory powers, but the land is taken by agreement.]

The heading to this fasciculus of sections is "with respect to mines"; it is perfectly general, and the clauses apply to all lands taken for the purposes of waterworks, whether compulsorily or by agreement. *Pountney v. Clayton* (5) decides that. The Public Health, 1875 (Support of Sewers), Amendment Act, 1883

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(1) [1891] A. C. 81.

(2) [1895] 1 Q. B. 459.

(3) [1893] 1 Ch. 427, 450.

(4) (1888) 13 App. Cas. 657, 690.

(5) 11 Q. B. D. 820.

(6) (1856) 2 Macq. 449.

C. A. (46 & 47 Vict. c. 37), applies to this case, and by enabling the corporation to fix a wider limit than forty yards removes any hardship in case of damage done by workings outside the limit. The Brine Pumping (Compensation for Subsidence) Act, 1891, s. 50, excludes railway, canal and gas and water companies, and sanitary authorities from compensation under that Act. That shews that in the opinion of the Legislature their rights were entirely provided for by the mining code of the Railways Clauses and Waterworks Clauses Acts, and they had no further rights at common law.

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Jenkins, K.C., in reply.

Cur. adv. vult.

Aug. 8. VAUGHAN WILLIAMS L.J. Since writing this judgment I have had the advantage of reading the judgment of Cozens-Hardy L.J., and I so entirely agree with his judgment and its terse expression of all that need be said that I should not have delivered this judgment had it not been that we are differing from the judgment of Farwell J. (now L.J.), and I think it right to deal with the grounds of that judgment as far as I can. A great deal of argument was addressed to us on the question whether what has been called the mining code—that is to say, that part of the Waterworks Clauses Act, 1847, which is contained in ss. 18 to 27—applied to the present case at all. It was argued by the appellants that it did not, on the ground that neither the Taylor conveyance nor the Stamford conveyance was, in fact, executed in pursuance of a special Act conferring powers of compulsory purchase. Both conveyances were executed under the special Act of 1847, which Act, although it conferred upon the Manchester Corporation by s. 34 the power to purchase, take, and use such of the lands delineated in the plans and described in the books of reference as should be necessary for the purpose of the works by the special Act authorized, yet conferred no compulsory powers applicable to the land conveyed. It was said this excluded the application of the mining code and that the words of s. 6 of the Waterworks Clauses Act—“Where by the special Act the undertakers shall be empowered, for the purpose of constructing or supplying

waterworks, to take . . . lands . . . otherwise than with the consent of the owners and occupiers thereof, they shall, in exercising the power so given to them, be subject to the provisions and restrictions contained in this Act"—limited the mining code to cases where the undertakers had compulsory powers. I cannot agree. Sect. 6 of the Waterworks Clauses Act, 1847, is under the heading "And with respect to the construction of the waterworks, be it enacted as follows"; whereas ss. 18 to 27 are under the heading "And with respect to mines, be it enacted as follows." The whole scheme of the Railways Clauses Act, 1845, ss. 77 to 79, as well as of the Waterworks Clauses Act, 1847, is based upon the idea that it would be hard upon these "undertakers," under statutory authority, of works of public utility (and the works must be assumed to be works of public utility, otherwise they would never have obtained a special Act) to throw upon them the obligation of acquiring in the first instance all the land, whether "surface land" or land beneath the surface, "subjacent or adjacent," which was or might be necessary for the support of the land upon which the works of public utility constructed by the authority of Parliament were to be constructed. Parliament, therefore, for the protection of railway and waterworks undertakers respectively, gave to them a compulsory power of acquiring such land, subjacent or adjacent, within a distance of forty yards of the works authorized by Parliament as the undertakers might think essential to the support of these works of public utility. This right of compulsory purchase is given in this way—first, the Waterworks Clauses Act, 1847, s. 22, throws upon the owners, lessees, or occupiers of land lying under such works, or within the prescribed distance of the same, the obligation, if desirous of working such mines, of giving the undertakers notice in writing of the intention so to do thirty days before the commencement of the working, and upon the receipt of such notice authorizes the undertakers to cause the mines to be inspected, and if it appear that the working of the mines is likely to damage the works, and the undertakers are willing to make compensation for such mines to such owner, lessee, or occupier, then he shall not work the same, and the amount of compensation, if disputed, shall be settled by arbitration. In my judgment s. 22 applies

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equally whether the land is acquired by the undertakers under a special Act conferring merely the power of acquisition of the land for such purposes or whether it confers "compulsory powers" for the acquisition of land for such purposes. In either case there is a compulsory power for preventing the working of mines within the prescribed distance if it appears to the undertakers that the working of such mines is likely to damage the said works and if the undertakers are willing to make compensation for such mines. I agree, therefore, in the conclusion of Farwell J. on this point, but I do not agree with him that this conclusion can be deduced from the observations of Cockburn C.J. in *Great Western Ry. Co. v. Fletcher* (1) if you substitute, as Farwell J. does, the words "Lands Clauses Consolidation Act" for the words in the report, "Provisions of the Railways Clauses Consolidation Act." Moreover, I think that in the present case if the "undertakers" had been willing to give compensation the mineowners, apart from s. 23, would not have been entitled to make it an item of compensation that if the working of the mine had not been stopped they would have been entitled to work every square yard of their mines without leaving, as the case might be, either pillars of coal to support the surface or breadths of coal to give lateral support to the land of adjacent owners. As in this case the plaintiffs did not within the thirty days state their willingness to treat with the defendants as lessees of the New Moss Colliery for payment of compensation for such mines, we have to consider how s. 23 affects the rights of the undertakers and the mineowners respectively as adjacent owners. Sect. 23 provides: "If before the expiration of such thirty days the undertakers do not state their willingness to treat with such owner, lessee, or occupier for the payment of such compensation, it shall be lawful for him to work the said mines and to drain the same, by means of engines or otherwise, as if this Act and the special Act had not been passed, so that no wilful damage be done to the said works and so that the said mines be not worked in an unusual manner." What is the meaning of the words "as if this Act and the special Act had not been passed"? I think that the

(1) 5 H. & N. 689, 698.

meaning in its application differs according as the mine is a subjacent mine reserved by an owner who sells a surface, or a mine adjacent to the land of some neighbouring owner. In the former case it may well be that these words mean "as if the vendor had never sold the surface of his land to which his mines were subjacent," in which case the owner of the mines would, of course, be entitled, if he chose to do so, so to work his own mines as to let down his own surface, but these words cannot have this meaning when applied to land adjacent to the mines of coal which the undertakers, although purchasers of the surface land and the land other than minerals, yet have neglected to acquire after receiving notice from the mineowner of his intention to work. There is no conveyance in such a case by the owner of the mines of the surface of his mines or any other part of his mines, surface or otherwise, to the adjacent owner. There is no conveyance to construe, no intention of parties to any instrument to ascertain. Supposing Taylor had never sold his land to the undertakers, he would have had as against the Stamford lessees of the adjacent colliery a clear right of lateral support for his land. The position of the undertakers who purchased Taylor's land under the powers not compulsory of their special Act of 1847 is plainly not identical with the position of Taylor before he sold—first, because under s. 22 of the Waterworks Clauses Act, 1847, the undertakers have a compulsory power of purchasing the adjacent colliery of the Stamford lessees which Taylor never had; secondly, because having this option of purchase they prefer the risk of damage to the exercise of the option of purchase. Is it a just implication of law to be drawn from these facts, differencing the position of the undertakers purchasing from Taylor under the powers of the Act of 1847 from the position of Taylor, the vendor, that the power given to the undertakers by statute of purchasing this area of adjacent or subjacent support leaves no room for an implication of law that any further support was intended; and by necessary inference negatives the continuance for the support of Taylor's land when purchased by the undertakers of the general common law incident of all land in its natural condition,—the right of lateral

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support from the adjacent land of neighbouring landowners? I think not. Such an implication and inference seem difficult to reconcile with any interpretation of the words "as if this Act and the special Act had not been passed." I think these words simply remit the mineowner to his common law rights, and I cannot think that the colliery lessees in the exercise of such rights can lawfully so work their coal as to deprive the corporation of the lateral support to which the corporation would at common law be entitled from the adjoining land of the defendants. The position of the New Moss Colliery upon the failure of the corporation to give a counter-notice of their willingness to compensate for such mines and thus to stop the working of them, is, in my judgment, that the New Moss Colliery is remitted to its common law rights, namely, that they may work their mines as if this Act and the special Act had not been passed, so that no wilful damage be done to the works of the undertakers, and so that the mines be not worked in an unusual manner. The proviso "so that no wilful damage be done to the works of the undertakers" seems, it is true, unnecessary if the miners are merely remitted to their common law rights; but I suppose that these words and the words about "not working in an unusual manner" were introduced to give some express protection to those carrying on works of public utility, even though they refused to buy the special protection afforded by s. 22. In my observations I have as yet spoken only of the lands within the prescribed forty yards. As to the land beyond this limit I cannot see any ground whatever upon which it can be said that the corporation has lost the right of support which Taylor, their vendor, clearly had. The result is that I think the plaintiffs have a good cause of action, and that the decision of Farwell J. must be reversed. I cannot help thinking that the learned judge has been misled by the expressions cited from various cases in which the question was between undertakers who had purchased land from a vendor who reserved so much of the land below the surface as was minerals, in which cases much turned on the statutory construction of the conveyance, and the consequent relative rights of the parties thereto. The result is that this appeal will be allowed, with, of course, the usual consequences.

ROMER L.J. I have had an opportunity of reading the judgment of Cozens-Hardy L.J., and I need only say that I agree with it.

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COZENS-HARDY L.J. This appeal raises an important question, which may, I think, be shortly stated. The Manchester Corporation in January, 1875, purchased from the Earl of Stamford and Warrington an estate of 246 acres, but in the conveyance the mines and minerals were expressly reserved to the Earl with full power to work all or any of the minerals without making compensation. In July, 1875, an adjacent estate of twenty-three acres was purchased from Taylor, but that conveyance expressly included all mines and minerals thereunder. At the date of these conveyances the corporation of Manchester had no compulsory power to purchase these properties, but they had under their Waterworks Act of 1847 a power to purchase by agreement. Later, in 1875, the Manchester Corporation obtained another Waterworks Act, which incorporated the Waterworks Clauses Act and the Lands Clauses Consolidation Act. A large reservoir has been constructed partly on the land thus purchased from Lord Stamford and from Taylor and partly on other adjoining lands. It is sufficient to say that part of the north embankment of the reservoir is on Taylor's land. The New Moss Colliery, Limited, are lessees of coal under Lord Stamford, including coal under the reservoir. In 1899 and 1903 they gave to the corporation notice of their intention to work certain mines adjacent to or under the reservoir. No counter-notice was given by the Manchester Corporation. The defendants worked the mines under the Stamford leases, with the result of withdrawing lateral support from Taylor's land and causing serious subsidence of part of that land. It was proved before Farwell J. that this subsidence was caused by mineral workings partly within and partly without the limit of forty yards from the reservoir, and further, that the subsidence would have taken place to an equal extent if the waterworks had not been there, and there was no suggestion that the mines were worked in an unusual manner. Under these circumstances it cannot be disputed that the Manchester Corporation, as owners

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of Taylor's land, had at common law a right of action against the defendants unless such right has been taken away by reason of the provisions of the Act of 1875 and the Acts incorporated therewith. Now I assume, without deciding it, that the provisions of ss. 18 to 27 of the Waterworks Clauses Act, 1847, apply, notwithstanding that at the date of the conveyances from Lord Stamford and Taylor the corporation had no compulsory powers. An argument to the contrary may be raised by reason of s. 6, but for the present purpose I assume this point in favour of the defendants. It will be convenient to consider the case, first, as to workings within the prescribed distance of forty yards, and, secondly, as to workings beyond that limit. As to the first, s. 22 imposes upon the mineowners the obligation of giving notice thirty days before approaching the prescribed limit, that is, forty yards, and an option is given to the undertakers to pay compensation and prevent the working of minerals within the forty yards. If, however, the undertakers do not within thirty days state their willingness to treat for compensation, s. 23 provides that it shall be lawful for the mineowners to work the said mines and to drain the same by means of engines or otherwise as if this Act and the special Act had not been passed, so that no wilful damage be done to the said works, and so that the said mines be not worked in an unusual manner. In the present case no counter-notice was given by the corporation. Sect. 23 came into operation. The parties were then remitted to their common law rights—the corporation, on the one hand, not being entitled to any protection in respect of the greater weight imposed upon the land by reason of the reservoirs and other works, and the mineowners, on the other hand, not being at liberty to do anything which would at common law have been an actionable nuisance. It seems to me to follow that the corporation, in the events which have happened, have retained their full right, in respect of Taylor's land, to claim damages for subsidence caused by the working of mines within the forty yards limit. As to the second, with respect to the damage caused by the workings beyond the forty yards limit, no protection seems to be given in any event to the undertakers. The mineowners are under no obligation to give a statutory notice under s. 22,

and the undertakers have no power to stop any such workings by means of a counter-notice, and I can see no reason why the mineowners should not be liable to the undertakers in respect of damage caused to Taylor's land. In short, it seems to me that ss. 18 to 27 have no application. In the result I think there is no necessity to distinguish, if it were possible to distinguish, between damages occasioned by workings within and damages occasioned by workings without the forty yards limit. Farwell J. seems to have considered that, except so far as protection is conferred by ss. 18 to 27, no claim of any kind could be made by the undertakers against mineowners. With great respect to the learned judge, I am unable to assent to this view. Sect. 23 seems to me to leave the parties to their common law rights, in the events which have happened, and I shrink from holding that anything which has happened has deprived the corporation of that right which they admittedly had at common law in respect of Taylor's land. I do not think it necessary to discuss the various authorities which were brought to our attention by counsel. It is sufficient to say that in my opinion there is no authority inconsistent with the view which I have taken. It follows that in my opinion this appeal ought to be allowed and an injunction granted, with an inquiry as to damages.

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Solicitors: *Austin & Austin, for William Henry Talbot, Manchester; Bower, Cotton & Bower, for H. G. Hall, Ashton-under-Lyne.*

J. R. B.

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[1906 H. 2882.]

Tramways—Protection of Mains—Notice by Promoters to Owner of Mains of Intention to construct Tramway—Counter-notice by Owner of Mains requiring Promoters to alter Position of Mains—Limit of Time for giving Counter-notice—Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 30, sub-s. 1.

By s. 30, sub-s. 1, of the Tramways Act, 1870, the promoters are empowered for the purpose of making any tramway to alter the position of any gas or water mains, but they must first give seven days' notice to the company or person to whom the mains may belong of their intention to lay down the tramway, and the notice must be accompanied by a plan of the proposed work, and "if it should appear to any such company or person that the construction of the tramway as proposed would endanger any such mains, such company or person may give notice to the promoters to lower or otherwise alter the position of the said mains" so far as necessary:—

Held, that the counter-notice to be given by the owner of the mains might be given at any time until the tramway was constructed.

APPEAL from an order of Bargrave Deane J., sitting as vacation judge.

The plaintiffs, the Hastings Tramways Company, moved for an injunction to restrain the defendants, the Hastings and St. Leonards Gas Company and Mr. H. Graham Harris, who had been nominated by the Board of Trade as referee to settle certain alleged differences subsisting between the plaintiff and the defendant companies, from proceeding further with the reference.

The plaintiff company were authorized by a special Act of 1903, which incorporated the Tramways Act, 1870, to lay down certain tramways in Hastings and St. Leonards.

On June 1, 1906, the plaintiff company, having first given the requisite notice under s. 26 of the Tramways Act, 1870, to the road authority of their intention to break up the roads specified in the notice, served on the defendant company a notice in accordance with s. 30 of the Tramways Act, 1870, that it was

their intention to construct the tramways authorized by their said special Act, and that such tramways or parts thereof would be situated in roads or streets where mains and pipes belonging to the defendant company were or might be situated, and this notice was accompanied by a plan and section of the proposed works. The defendant company made no reply to this notice until June 26, when they wrote to the plaintiff company suggesting that that company should guarantee a thickness of one foot of concrete over the defendant company's mains.

The plaintiff company, however, declined to accede to this suggestion.

On July 2 the plaintiff company commenced the construction of the tramways.

On July 6 the defendant company served on the plaintiff company a notice that the defendant company considered the construction of the tramways in the position shewn on the plan deposited with them would endanger their mains, and calling upon the plaintiff company, in pursuance of the provisions of s. 30, sub-s. 1, of the Tramways Act, 1870, to alter the position of the defendant company's mains in such a way as the engineer to the defendant company might agree before continuing the tramways on the sea front. After some further correspondence the defendant company applied to the Board of Trade for the appointment of a referee under s. 33 of the Tramways Act, 1870, on the ground that a difference had arisen between the two companies under s. 30 of the Tramways Act, 1870, as to whether the plaintiff company in the construction of their tramways ought to alter the position of the mains of the defendant company in accordance with the contention of the latter company that the construction of the tramways as proposed would endanger their mains. On September 15, 1906, the Board of Trade appointed the defendant Harris referee to settle the matters in difference. The referee took a view of the locus in quo, but had not proceeded further with the arbitration at the time when these proceedings were taken.

The motion was based on the view that the counter-notice given by the defendant company on July 6 was invalid by reason of its not having been given within seven days of the

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date of the notice given by the plaintiff company to the defendant company of their intention to commence the work, and that consequently there was no matter of difference between the parties within s. 30 of the Tramways Act, 1870. (1)

Bargrave Deane J. refused the motion.

The plaintiff company appealed.

Roskill, K.C., and *Attwater*, for the plaintiff company. The question whether the defendants' notice is out of time depends on the construction of s. 30 of the Tramways Act, 1870, considered in connection with ss. 26 and 27 of that Act. By s. 26 the promoters may break up roads for the purposes of their tramways, but they must give to the road authority at least seven days' notice before commencing the work, specifying the time of commencement; and by s. 27 the promoters are bound, unless the road authority otherwise consents, to complete the work and reinstate the road within four weeks of the time when the road is first broken up, and are subject to heavy penalties if they fail to comply with the requirements of the section. Then by s. 30 the promoters, for the purpose of laying down their tramways, may

(1) Sect. 30: "For the purpose of making, forming, laying down, maintaining, repairing, or renewing any of their tramways, the promoters may from time to time, where and as far as it is necessary alter the position of any mains or pipes for the supply of gas or water subject to the provisions of this Act, and also subject to the following restrictions; (that is to say,)

"1. Before laying down a tramway in a road in which any mains or pipes may be laid, the promoters shall, whether they contemplate altering the position of any such mains or pipes, ... or not, give seven days' notice to the company, persons, or person to whom such mains or pipes, ... may belong or by whom they are controlled, of their intention to lay down

or alter the tramway, and shall at the same time deliver a plan and section of the proposed work. If it should appear to any such company or person that the construction of the tramway as proposed would endanger any such main or pipe, ... or interfere with or impede the supply of water or gas such company or person (as the case may be) may give notice to the promoters to lower or otherwise alter the position of the said mains or pipes, ... in such manner as may be considered necessary, and any difference as to the necessity of any such lowering or alteration shall be settled in manner provided by this Act for the settlement of differences between the promoters and other companies or persons"

alter the position of gas mains, but before laying down the tramways, whether they wish to alter the mains or not, they must give seven days' notice to the gas company, and if the gas company consider that the construction of the tramways will endanger their mains they may give a counter-notice to the promoters calling on them to alter the position of the mains so far as necessary, and in case of difference a referee is to be nominated by the Board of Trade. Although the section does not in terms fix any limit of time for the giving of the counter-notice by the gas company we submit that, having regard to the terms of ss. 26 and 27, there is a necessary implication that the counter-notice shall be given within the seven days during which the original notice extends, because otherwise it will be within the power of the gas company wantonly to expose the tramway company to very severe penalties by making it impossible for them to complete the work within the time limited by the Act. The Act of Parliament must have intended that the two operations of making the tramways and altering the mains should be contemporaneous. In the case of sewers the Act expressly provides (s. 31) that the counter-notice to be given by the sewer authority must be given within the time during which the original notice extends, and there can be no reason for supposing that the Legislature intended to draw any distinction for this purpose between sewers and gas mains.

Upjohn, K.C., Bramwell Davis, K.C., and J. Henderson, for the defendant company.

FLETCHER MOULTON L.J. There is only one point involved in this appeal, and that a very simple one. Under s. 30 of the Tramways Act, 1870, provisions are found applying to the case where a tramway is to be constructed along streets in which gas or water companies have laid down their mains. The fact that the mains are there does not take away the right of the tramway company to break up the soil and execute their works there; but there are certain statutory conditions of their exercising that power, the principal of which is that they must, before doing any work, give seven days' notice to the owners of the mains lying in the road, accompanying the notice with a plan shewing the

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details of the work that they propose to construct. The owners of the mains have the right to give a counter-notice that they object to the proposed works if they interfere with their mains in a way which they consider unreasonable or improper. Regulations of this kind are necessary, not only in the case of gas and water mains, but also in the case of sewers, and there is another section in this Act which deals with that case. In the case of sewers there is a specific provision that the counter-notice must be given within a certain number of days. In the case of gas and water mains there is no specific provision as to the time within which the counter-notice must be given.

The only point involved in this appeal is whether we are to read into the clause which relates to gas and water mains a provision that the counter-notice must be given within the seven days, the period of the notice which the tramway company are required to give. All I can say is that I see no reason or justification for reading such a limitation into s. 30; and the fact that where it is intended to exist, as in the case of the sewers, it is specifically expressed strengthens my opinion.

I am, therefore, of opinion that the gas company are not limited to those seven days for giving their counter-notice, and that, therefore, the gas company were entitled to have an arbitration as to the propriety of the works which the tramway company propose to execute. I am of opinion that this appeal should be dismissed with costs.

BUCKLEY L.J. I agree. Sect. 30 of the Act of 1870 does not contain in so many words any limit of time for the giving by the gas company of their counter-notice. We are asked to say that such a limit of time is to be introduced as is found in another section (s. 31) with reference to another body, the owners of the sewers. The fact that the Act contains it in the one case and does not contain it in the other is a strong argument against inferring it in the case where you do not find it.

Further, I think that s. 30 does impose a certain limit of time, which is to be found in the words "If it should appear to any such company or person that the construction of the tramway as proposed would endanger any such mains." The time for the

giving of the notice is, I think, at an end so soon as proposal has ripened into execution, but so long as the tramway remains in proposal only I see nothing in the Act to prevent the gas company saying, "We assert that your works will endanger our mains, and we wish to go to arbitration upon it."

The argument addressed to us is that because under s. 27 penalties are imposed if the promoters fail to comply with certain provisions as to the time for the completion of the works we ought to say that the gas company are under a limit of time which the Act has not expressed. I fail to see the force of that argument. The penalty is imposed if the promoters do not do their duty. If they are prevented from completing their works by notice properly given under the statute by another authority, the tribunal which had power to impose the penalty, if penalty be incurred, could meet the difficulty by imposing merely a nominal penalty or by declining to impose any because the promoters had not really failed in their duty. I think that the appeal fails.

It was agreed that the motion should be treated as the trial of the action. Accordingly the action was dismissed with costs, including the costs of the motion and the costs of the appeal.

Solicitors: *Ashurst, Morris, Crisp & Co.; Dawes & Sons, for Young, Son & Coles, Hastings.*

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In re SAMSON.ROBBINS *v.* ALEXANDER.

[1905 S. 974.]

Administration of Assets—Executor—Preferential Payments—Specialty Debt—Administration of Estates Act, 1869 (Hinde Palmer's Act) (32 & 33 Vict. c. 46).

Hinde Palmer's Act, the object of which was only to place specialty and simple contract creditors on an equal footing inter se, in no way deprives an executor of his administrative right to pay his testator's debts in any order he may think fit and to pay a simple contract creditor in priority to a specialty creditor, notwithstanding that the result may be that the latter may eventually remain pro tanto unpaid.

Decision of Joyce J. reversed.

In re Hankey, [1899] 1 Ch. 541, overruled.

ADJOURNED SUMMONS AND FURTHER CONSIDERATION.

This was a summons to vary the Master's certificate in an administration action, which raised the question whether there is anything in the Administration of Estates Act, 1869 (Hinde Palmer's Act), which deprives an executor of his administrative right of preferring one creditor to another by paying the simple contract creditors of his testator in full without making provision for the specialty creditors. The facts were as follows:—

In November, 1892, the testator W. M. Samson died, having appointed the defendants his executors, and having devised and bequeathed to them all his estate upon trust for the benefit of his three children.

The testator left personal estate, valued for probate at 743*l.*, but which eventually only realized some 360*l.*; and real estate, consisting of a freehold house, No. 3, Marlborough Place, St. John's Wood, then let to a tenant for twenty-one years at 120*l.* per annum, which had been valued for purposes of sale at 2100*l.* This freehold house was subject to a mortgage for 1800*l.*, and interest at 5*l.* per cent. secured by a deed of September 9, 1889.

The testator's simple contract debts amounted to 453*l.*; the only specialty debt was the 1800*l.* mortgage and interest.

One of the executors, a son of the testator, advanced out of his own money the additional amount necessary to pay off all the simple contract creditors, who were all paid in full in or before the year 1894; but no provision was made for the 1800*l.* mortgage debt, which was believed to be sufficiently secured by the freehold house.

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The rent of the freehold house being more than sufficient to pay the interest on the mortgage, the balance was paid to the executor son in satisfaction of the money advanced by him for payment of the simple contract debts; in 1904 these surplus rents had about wiped off the amount so advanced by the executor son.

In September, 1904, the tenant of the freehold house died, and in the following November the executors accepted a surrender of the lease (1); the house remained unlet, the interest on the 1800*l.* mortgage fell into arrear, and foreclosure proceedings were commenced but not proceeded with.

In March 1905, the mortgagees, having valued their security at 1500*l.*, claimed to prove against the testator's estate for the balance of their debt, and commenced proceedings by originating summons against the executors for the administration of the real and personal estate of the testator; and by an order of May 27, 1905, the usual accounts and inquiries were directed.

The Master by his certificate of June 21, 1906, found that the mortgagees, the plaintiffs, were the only unsatisfied creditors of the deceased, and that their debt was 212*l.*; he also allowed the executors in full all the payments made by them to the simple contract creditors in 1892—1894, amounting to 453*l.*

The plaintiffs thereupon took out a summons to vary this certificate by disallowing the payment in full of the simple contract debts, amounting to 453*l.*, on the ground that, the estate being insolvent, the said simple contract debts could not in law be preferred to the specialty debt of the plaintiffs, and that such simple contract debts ought to be paid or allowed only *pro rata* with the sum of 212*l.* found due to the plaintiffs.

On July 19, 1906, the further consideration of the action and

(1) The effect of this surrender was considered in an action of *Reo- bins v. Whyte*, [1906] 1 K. B. 125.

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the summons to vary were heard together before Joyce J., when his Lordship, following *In re Hankey* (1) in preference to *In re Orsmond* (2), but without expressing any individual opinion, allowed the summons, and made a declaration that the estate of the testator was distributable between the specialty and simple contract creditors of the testator in the proportions which the simple contract and specialty debts bore to one another respectively, and that the defendants were not entitled to apply any part of the estate attributable to the specialty creditors under the above declaration in payment of the debts due to the simple contract creditors: the matter was referred back to the Master to vary his certificate accordingly.

The defendants, the executors, appealed. The appeal was heard on October 29, 1906.

Hughes, K.C., and *G. R. Northcote*, for the appellants. The effect of *Hinde Palmer's Act* being to place simple contract creditors and specialty creditors upon the same footing, and thus to make all the debts of the same class, an executor may pay them in any order he thinks fit until an administration judgment has been obtained, and may pay a simple contract creditor in priority to a specialty creditor. In *Seton on Judgments*, 6th ed. p. 1425, it is stated that since this Act a simple contract creditor may be preferred to a specialty creditor, and for this the authority cited is *In re Orsmond* (2), and this has been the practice invariably adopted in chambers. *In re Hankey* (1) is not referred to. The decision in *In re Hankey* (1) is erroneous; the decision in *In re Orsmond* (2) is correct. There is no reason now for any apportionment by an executor, in the absence of an administration judgment, between the two classes of creditors; all creditors are now in the same class. After a judgment for administration creditors are paid *pari passu*, but until a judgment has been obtained there is nothing in *Hinde Palmer's Act* which takes away from an executor his administrative right to prefer one creditor to another.

It would appear from *In re Jones* (3), approving *Wilson v.*

(1) [1899] 1 Ch. 541.

(2) (1888) 58 L. T. 24.

(3) (1885) 31 Ch. D. 440, 447.

Coxwell (1), that an executor's right of retainer has been enlarged, and this has been followed in *In re Bentinck* (2), but in these cases, as well as in *In re Briggs* (3), the present point was not material.

[FLETCHER MOULTON L.J. Unless the Court is driven to it, I am very reluctant to go into the question of an executor's right of retainer; the present case seems to me to be a mere question of the true meaning of Hinde Palmer's Act as affecting an executor's right to pay the creditors in any order he chooses.]

Our contention is that this right of preference has been enlarged by the Act, and that the decision in *In re Orsmond* (4) is to be preferred for this reason to *In re Hankey*. (5)

Younger, K.C., and *R. Nevill*, for the respondents, the plaintiffs. One of the executors found money to pay some of these debts, and therefore was entitled to stand in the place of the creditors so paid, and to this extent he could exercise his right of retainer.

[FLETCHER MOULTON L.J. The executor only represented the creditor so paid; he did not occupy the same position as an executor who is also a creditor.]

Retainer is only an exercise of the right of preference by the executor in favour of himself; there is no difference between the right to retain, which is merely the right to prefer oneself, and the right to prefer one creditor to another: *Talbot v. Frere*. (6) *In re Williams' Estate* (7) has really nothing to do with this point.

The Court cannot decide in favour of a right of preference in the executor without also deciding in favour of the executor's right of retainer, i.e., an extension of this right of retainer as against specialty creditors; to do this will be to overrule numerous cases which have long been acted on as correct. *Wilson v. Coxwell* (1), *In re Jones* (8), and *In re Briggs* (3) shew that the right of preference has not been enlarged so as to enable an executor to retain the amount of a simple contract debt due to himself to the prejudice of a specialty creditor.

[BUCKLEY L.J. *In re Williams' Estate* (7) is inconsistent with *In re Jones*. (8)]

(1) (1883) 23 Ch. D. 764.

(2) [1897] 1 Ch. 673.

(3) [1894] W. N. 162.

(4) 58 L. T. 24.

(5) [1899] 1 Ch. 541.

(6) (1878) 9 Ch. D. 568.

(7) (1872) L. R. 15 Eq. 270.

(8) 31 Ch. D. 440, 447.

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In re Jones (1) was followed in *In re Bentinck*. (2) [*In re Compton* (3) was also referred to.]

The equality prescribed by Hinde Palmer's Act is satisfied by appropriating the assets rateably among specialty creditors as a class, and simple contract creditors as a class, but except to the extent to which this rateable proportion increases the fund out of which an executor may retain his own, or prefer other simple contract debts, the right of retainer or preference has not been extended by Hinde Palmer's Act.

[VAUGHAN WILLIAMS L.J. Then the exercise of those rights cannot take place until after the division of the assets into two funds.]

Not necessarily, but unless the Court is prepared to hold that the principle of the cases cited on retainer cannot now be applied, then *In re Hankey* (4) is correctly decided, as we submit it is. *In re Orsmond* (5) is inconsistent with all the other authorities, and is wrong in principle.

Further, we say that on the wording of the Act the object of it was to promote equality between all classes of creditors, who were all to "be treated as standing in equal degree and be paid accordingly out of the assets," therefore the right to prefer and the right to retain are abolished, and creditors are to be paid on the basis that they are all creditors in an equal degree.

VAUGHAN WILLIAMS L.J. I have been very much impressed by the argument which has been addressed to us by counsel for the respondents.

I can well understand it being said in argument that the effect of these words "paid accordingly out of the assets" is to abolish and to get rid of every sort and mode of preference in administration under which one creditor will be better treated than another, but, although I can understand that argument, I wish to point out that when you look at the recital in this Act it is plain that this is an Act to abolish the distinction as to priority of payment between specialty and simple contract debts

(1) 31 Ch. D. 440, 447.

(3) (1885) 30 Ch. D. 15.

(2) [1897] 1 Ch. 673.

(4) [1899] 1 Ch. 541.

(5) 58 L. T. 24.

of deceased persons—that is to say, that in future creditors are to be dealt with on an equality, and that one class of creditors is not to be placed in a better position than the other, and when one comes to look at the 1st section of the Act, it is exactly on the same lines: “No debt or liability of such person”—that is, of the creditor—“shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt”—there again all that the Act is dealing with is the rights of creditors inter se—“but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree.” Again it is equality amongst creditors inter se without distinction of class of creditors; then follow the words, “and be paid accordingly out of the assets of such deceased person.”

Now it seems to me that the natural and simple meaning of those words is that these creditors are to be paid upon the basis that they are all of them creditors standing in equal degree. It does not seem to me that that provision in any way touches the right of the executor in the course of the administration to pay debts which stand in the same degree in such order as he chooses until there is a judgment, and it seems to me that there is nothing in those words to touch either the right of the executor to prefer one debt to another in the course of administration until there is a judgment, nor does it affect that upon which a good deal has been said in argument, which I do not think is very material, viz., the executor’s right of retainer. It is quite plain that these two rights are rights which may continue quite consistently with dealing with all the creditors as standing in equal degree. Even if this was not the construction which one would naturally put upon these words as mere words, there are practical reasons which would induce one to give that construction to the words if one reasonably could do so, because it was admitted in substance by Mr. Younger that the practical effect of adopting the rules of administration suggested by his argument would be that in every case an executor, if he wished to be safe, would have to take care not to pay anybody until there had been an administration judgment, with the result that everyone

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must be paid *pari passu*; but one knows that cases constantly arise in which a prudent man may hope and expect that the estate will turn out solvent, but he may feel that it is possible that it may not, in which case a prudent executor would hold his hand. What would be the result? Some of the creditors of the testator would probably begin to sue him in the hopes of getting a judgment which might enable them to realize 20s. in the pound, and the administration of the estate would immediately be conducted under an administration judgment, because some one creditor, for the protection of himself and all the other creditors, would take care to put an end to the possibility of one of their number getting 20s. in the pound by starting an administration action.

I regard this case as merely one in which we have to construe this Act of Parliament. It is said that it is the first time that the construction of Hinde Palmer's Act has really come before this Court. That may be so, but the matter has been indirectly discussed by various judges upon a good many occasions; and, notwithstanding the judgment which I am now delivering, I recognize quite well that the trend of recent cases has been rather in favour of holding that these old rights of the executor in administration did continue, but that, continuing, they were to be dealt with as if the classes of specialty creditors and simple contract creditors and the priority of one over the other also still continued. I do not deny that at all; but, on the other hand, it seems to me that, if one looks at the case of *In re Williams' Estate* (1), it is plain that Wickens V.-C. would not have adopted the view which some of the modern cases have adopted, but would have adopted the view which is really the basis of the judgment which I am now delivering, for he evidently thought that the effect of the Act was to place all creditors, whether specialty creditors or simple contract creditors, as standing in the same degree, and, therefore, when it continued these rights which I have spoken of, that they should be effectual against all creditors standing in the same degree, and that the old distinction which puts specialty creditors and simple contract creditors in different degrees was to be entirely abolished and done away with. I

(1) L. R. 15 Eq. 270.

was struck with this in the course of Mr. Younger's very able argument, that he always found himself landed in this difficulty, that before Hinde Palmer's Act you really had two funds to be administered in this sense, that you had first the specialty creditors, who were to be entitled to come first on the fund, while the simple contract creditors had only a right to come on, what I will call for convenience, the residuary fund; and yet *prima facie* the words of this section would seem to abolish any such distinction between the funds.

In support of the argument put forward by Mr. Younger it was said that we are to treat the case as if there were two funds, a specialty creditors' fund and a simple contract creditors' residuary fund, and that these two rights of the executor in administration, one a personal right and the other the discretionary right, are to be dealt with as if, notwithstanding the words of the statute, this inequality, which existed before the statute, was to continue.

I invited Mr. Younger to adopt the view, because I thought it best suited his argument that the exercise of these rights was not to take place until after the division or apportionment of the estate, and that then the right of the executor, whether it be the right of preference in administration or his personal right or privilege of retainer, would only be operative upon that proportion of the fund already equally divided which was divisible amongst the simple contract creditors; but Mr. Younger would not adopt this suggestion.

I have now only to say that, according to my judgment, this Act of Parliament is merely intended to produce equality of distribution by means of the abolition of the distinction between specialty creditors and simple contract creditors, and I do not see anything in it or in the words "paid accordingly"—which, as I have already said, I treat as paid upon the basis of equality—which in any way would justify us in saying that the statute deprives the executor either of his administrative right or of his personal protective right.

Under these circumstances I think the judgment of Joyce J. was wrong. I may observe that the judgment of Joyce J. is not the expression of his personal opinion, but merely

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that he is giving effect to a decision of North J. in *In re Hankey*. (1)

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FLETCHER MOULTON L.J. I am of the same opinion. Prior to Hinde Palmer's Act an executor in the administration of an estate was compelled to divide the liabilities into those which were specialty debts and those which were simple contract debts. With regard to the debts in each one of these classes he had the power to pay them in any order, but he was bound to satisfy all the specialty debts before he gave anything to the simple contract debts. Hinde Palmer's Act was, in my opinion, intended solely to abolish this distinction between specialty debts and simple contract debts, and put every estate in the same position as though it had debts of only one kind. This was its intention, and the language appears to me admirably to carry out that intention. Henceforth executors have only to consider the liabilities as if they were of equal degree. The consequence is that the power of paying in any order debts of equal degree is untouched by Hinde Palmer's Act, but it now extends to all the debts of the estate, and, therefore, this appeal must be allowed. We have been pressed with a long series of cases which deal with the question of the right of retainer which an executor possesses in the administration of an estate with respect to a debt due to himself. Now I wish to say that, although I cannot deny that I have formed an opinion on the subject, I hold that it does not come before us on this occasion, and I do not express any opinion with regard to the question whether the right of retainer is affected in any and what way by Hinde Palmer's Act; but I am of opinion that so far as the cases that have been quoted to us suggest that under the present law two funds ought to be formed, one in respect of the specialty debts and the other in respect of the simple contract debts, those decisions are erroneous, and are in direct conflict with the provisions of Hinde Palmer's Act.

BUCKLEY L.J. I agree. We have heard a long and very interesting argument upon the question of how far the Act of

1869, generally known as Hinde Palmer's Act, has affected the executors' right of retainer. Upon that I express no opinion at all. So far as it is possible so to do after hearing that argument I keep my mind in suspense upon it till it comes to be argued. It is unnecessary to determine it for the purpose of this case. The question of retainer arises where a debtor dies and makes his creditor his executor. That is not this case. What happened here was that the executors paid certain debts to certain creditors who were not executors, and the question to be resolved is not to my mind affected in any way by the fact that the money for the payment of those debts was in point of fact found by one of the executors, the estate, I suppose, not being realizable at the moment. The result of that was that he became a creditor of the estate as a whole. The question for our decision is whether in administration it was right, after Hinde Palmer's Act, for the executor to pay the simple contract creditors in full, leaving a specialty creditor to some extent unpaid. To my mind the true construction of Hinde Palmer's Act is simply this. It begins by a recital which recognizes that at the date of the Act there were creditors of two classes, of which the one class had a priority over the other class: the operative part of the Act provides that there shall not be two classes in future; that a specialty shall give no priority or preference; that all creditors, specialty and simple contract, shall stand in equal degree. In other words, it was an Act which altered the rights of persons who had claims against the estate. The Act had nothing to do with administrative acts, nothing to do with that which the executor might do in administering the estate. It simply varied the rights of the persons who could claim against it. The words "shall be paid accordingly" mean simply "shall be paid upon the principle that there is only one class." Now at the date of the Act there existed a right in the executor in administration to pay one creditor, although he did not simultaneously pay another. Notwithstanding that the result might be that the latter would go unpaid, or pro tanto unpaid, it was no devastavit for the executor to do that act. As to that, Hinde Palmer's Act seems to me to have no effect at all. The Act did not affect in any way the right of an

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executor to go to a particular creditor and pay him although he did not simultaneously pay another. I go on to add what is no doubt the weaker argument, the argument *ab inconvenienti*, to shew how utterly impossible it would be for executors ever to administer an estate if that view of the Act of Parliament were taken. The result would be that in a vast number of cases an executor could never safely pay any creditor in full. For it might turn out that the estate would not produce enough. The result would be that the executor would have to go to the creditor and say, "Unless you get a judgment against me, in which case I can safely pay you in full, I cannot pay you. You must wait." If he tendered him a dividend, the creditor might reply, "I will not take a dividend; I will have 20s. in the pound, or I will take nothing." The result would be that in every case the executor would be in peril, and would have to institute, or invite some creditor to institute, an action for administration. Of course, that is a result which one would be very sorry to see ensue. In my judgment this Act of Parliament has had no such effect as is contended for. I think the decision of North J. in *In re Hankey* (1) was erroneous. This appeal must therefore succeed. The proper order will be to discharge the order below and dismiss the summons to vary with costs.

Solicitors: *Collyer-Bristow & Co.*; *Malkin & Co.*

(1) [1899] 1 Ch. 541.

W. C. D.

In re JUDE'S MUSICAL COMPOSITIONS.

KEKEWICH
J.

Copyright—Registration—Musical Composition—Agreement—Author and Publisher—Assignment—Entry on Register—Copyright Act, 1842 (5 & 6 Vict. c. 45), ss. 2, 13.

1906

July 25, 26,
27.

In July, 1900, J., who was the registered proprietor of the copyright in a musical composition called "Music and the Higher Life," entered into an agreement with N., the managing director of a publishing company, whereby, in consideration of J. giving N. the sole and exclusive right of printing and publishing the series of "Music and the Higher Life" and issuing it in volume form, N. and J. jointly agreed that—(1) the cost of printing and issuing the volume should be borne by N.; (2) N. should pay J. 6*d.* on every copy sold; (3) N. should supply J. with such copies as he might require at 1*s.* 6*d.* per copy, any copies to be supplied to J. not to be liable to the royalty of 6*d.*

In 1903 the publishing company registered themselves as proprietors of the copyright in two other musical compositions by J., called "The Liedertafel Series" and "The Preacher-Musician Series," alleging that the copyright belonged to them upon the same terms as that of "Music and the Higher Life." They also registered themselves as proprietors of the copyright in "Music and the Higher Life (abridged edition)," and asserted that all three registrations were made with the sanction of J. Upon a motion by J., under the Copyright Act, 1842, to expunge these three entries from the registry, on the ground that he had never parted with the copyright:—

Held (following *Stevens v. Benning*, (1854) 1 K. & J. 168; (1855) 6 D. M. & G. 223), that the agreement of July, 1900, was a publishing agreement, and did not amount to an assignment of the copyright.

Held, further, that the registration by the publishing company of these three books was not an entry of an assignment of the copyright within s. 13 of the Copyright Act, 1842.

THIS was a motion under the Copyright Act, 1842, by William Herbert Jude that the entries made in the Registry Book of the Stationers' Company, whereby Reid Brothers, Limited, were registered as proprietors of the copyright in three musical compositions entitled "The Liedertafel Series of Carols, descriptive choral hymns, male voice glees, &c., edited by W. H. Jude"; "The Preacher-Musician Series of Revival Songs, edited and arranged by W. H. Jude"; and "Music and the Higher Life (abridged edition), with other solos, by W. H. Jude," might be expunged. The motion came before the Court on March 23, 1906, and stood over for the respondents to deliver points of

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defence. The motion was now treated as if it was the trial of the action, the affidavit in support of the motion being treated as a statement of claim.

W. H. Jude was a musical composer and evangelistic preacher. The respondents, Reid Brothers, Limited, were the printers and publishers of his compositions, William Cartwright Newsam being the managing director of the company. Their predecessors, Messrs. Reid Brothers, had also printed and published for Mr. Jude, he paying the cost of the composing and plates, and having a share in the profits. In 1894 the plaintiff wrote a series of sacred songs and services entitled "Music and the Higher Life" and published them in single numbers.

On April 2, 1897, W. H. Jude registered himself as proprietor of the copyright of "Music and the Higher Life," giving the name of the publisher as that of Reid Brothers. They shortly afterwards were formed into a limited company. On March 19, 1899, Mr. Jude appointed Reid Brothers, Limited, sole agents for the sale of the series "Music and the Higher Life" on consideration of their using their best endeavours to influence the sale of the series. On July 27, 1900, Mr. Jude and Mr. Newsam entered into the following agreement:—

"In consideration of Mr. W. H. Jude giving Mr. W. C. Newsam the sole and exclusive right of printing and publishing the series of 'Music and the Higher Life,' and issuing the same in volume form, Mr. W. C. Newsam and Mr. W. H. Jude jointly agree to the following conditions:—

"(1.) The cost of printing and issuing the volume to be borne by Mr. W. C. Newsam.

"(2.) Mr. W. C. Newsam to pay Mr. W. H. Jude 6*d.* on every copy sold.

"(3.) Mr. W. C. Newsam to supply Mr. W. H. Jude with such copies as he may require from time to time at 1*s.* 6*d.* per copy, any copies supplied to Mr. W. H. Jude not to be liable to the afore-mentioned royalty of 6*d.*"

Mr. Jude retained the ownership of the plates which were lent to Mr. Newsam. By an agreement of November 8, 1902, Mr. Newsam assigned his rights to Reid Brothers, Limited. Two further series of musical compositions, called "The Liedertafel

Series" and "The Preacher-Musician," were brought out by Mr. Jude in 1900 and 1902 respectively. In June, 1903, an abridged edition of "Music and the Higher Life" was brought out, containing thirty-six numbers from the original volume, seven from "Liedertafel," and two from the "Preacher-Musician."

On April 15, 1903, Reid Brothers, Limited, registered themselves as proprietors of the copyright in "The Liedertafel Series." On August 13, 1903, they registered themselves as proprietors of the copyright of "Music and the Higher Life (abridged edition)," and on August 19, 1903, as the proprietors of the copyright of "The Preacher-Musician Series." Two of the series were also registered in America. They alleged that these three entries were made with the knowledge and approval of Mr. Jude, but he entirely denied this. By a letter of July 11, 1904, from Mr. Jude to the secretary of Reid Brothers, Limited, Mr. Jude wrote: "Kindly tell Mr. Newsam that the terms for the 'Preacher-Musician' and 'Liedertafel Series' had better be the same as 'Music and the Higher Life.'"

By a letter of February 20, 1905, from Mr. Jude to Mr. J. H. Riley Mr. Jude stated as follows:—

"In consideration of your advancing me the sum of 100*l.* for twelve months, I hereby charge all my rights and interests in the work composed by me, and entitled 'Music and the Higher Life,' by way of security for the advance. In the event of my failing to repay the money advanced by you within the time specified, you have my full authority and permission to dispose of my said rights in any such manner as you may think fit, and I undertake and agree to execute any further assignment to complete this charge, if called upon by you to do so."

Mr. Jude only repaid 20*l.* of this loan within the year, and on January 21, 1906, Mr. Riley, in consideration of Mr. W. C. Newsam paying him the sum of 80*l.*, agreed to assign to him all and every right in "Music and the Higher Life" acquired by him in the agreement of February 20, 1905. Mr. Jude alleged that he was the sole composer of the music, and the sole proprietor of the copyright in each of the three books and compositions registered by Reid Brothers, Limited, and on March 2, 1906, gave notice of motion as above set out. The respondents

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KEKEWICH said that the copyright on "Music and the Higher Life" belonged
 J. to them—(a) under a verbal agreement to assign it to W. C.
 1906 Newsam on specified conditions; (b) under the assignment of
 {
 JUDE'S JULY 27, 1900, to W. C. Newsam, and the further assignment by
 MUSICAL Newsam to the respondents dated November 8, 1902; (c) under
 COMPOSI- the assignment of January 21, 1906, from J. H. Riley under
 TIONS, his power of sale. The respondents alleged that on the faith of
 In re. the first two agreements they had spent large sums in advertising
 — the books.

Scrutton, K.C., and *E. J. Elgood*, for the applicant.
 Nothing but a written assignment of a copyright is sufficient
 under the Copyright Act, 1842: *Leyland v. Stewart*. (1) The
 terms of the agreement of July 27, 1900, shew that it was not
 intended to pass the copyright. If it had been, it was easy
 enough to use the word "copyright." All the other circum-
 stances and the correspondence which passed between the
 parties are inconsistent with the assignment of the copyright to
 Newsam. The agreement was an author and publisher agree-
 ment only. On the evidence, Mr. Jude was wholly unaware of
 the registration by the defendants in their own names of the copy-
 right in these publications, and he certainly never sanctioned it.

P. O. Lawrence, K.C., and *Harold Hardy*, for the respondents.
 The agreement of July 27, 1900, passed the copyright. The
 words used are very nearly the same as those contained in s. 2
 (the definition section) of the Copyright Act, 1842. By the
 registration of the copyright by the respondents there was an
 entry in writing made in the books of the registry sufficient to
 satisfy s. 13 of the Act, which requires a registered proprietor to
 assign his interest by "making an entry" in the books.

Scrutton, K.C., in reply. The agreement of July 27, 1900,
 will be narrowly scrutinized by the Court, as it was drawn up by
 Mr. Newsam, who was conversant with such matters. Mr. Jude,
 being the registered proprietor of the copyright in "Music and the
 Higher Life," there must be something in writing to take the
 copyright out of him. The agreement was not an assignment of
 the copyright, although no doubt the words approach somewhat

(1) (1876) 4 Ch. D. 419.

nearly to the words in the definition clause of the statute. A KEKEWICH J. similar case was decided under the Dramatic Copyright Act, 1833 (3 & 4 Will. 4, c. 15): *Eaton v. Lake*. (1) The agreement in the present case was really a publishing agreement similar to those held to be such in the cases of *Stevens v. Benning* (2) and *Reade v. Bentley*. (3) The remarks of Wood V.-C. in the former of these cases are very much in point.

P. O. Lawrence, K.C., as to the case of *Stevens v. Benning* (2): It may be that if the words to be found in the present case passing the "sole and exclusive right of printing and publishing the series" had been found in *Stevens v. Benning* (2), the decision would have been different.

KEKEWICH J. The object of this action is to have it determined that the respondents, Reid Brothers, Limited, are not properly registered as the proprietors of three books, entitled the "Liedertafel Series," the "Preacher-Musician Series," and the abridged edition of "Music and the Higher Life."

It is necessary to consider how far the original publication, "Music and the Higher Life," was made over to Messrs. Reid Brothers, or rather, in the first instance, to Mr. Newsam, through whom they claim. That depends on the proper construction to be given to a document of July 27, 1900. At that date the applicant Mr. Jude was the author of, and therefore the owner of, the copyright in this book, "Music and the Higher Life." Reid Brothers were his publishers, and publishers on the terms that he paid for the printing and was to receive a certain proportion of the profits. He was on friendly terms with Mr. Newsam, who represented the firm. So far there is no difficulty in reviewing the position at the date of this agreement. Beyond what I have said, there was no reason why the copyright should be assigned by Mr. Jude to Mr. Newsam. It might be convenient for the parties to do so: the consideration passing might be sufficient, and if they made proper terms there was no reason why the copyright should not be assigned; but there is nothing on the face of the document, and there is nothing in the facts, which

(1) (1888) 20 Q. B. D. 378. (2) 1 K. & J. 168; 6 D. M. & G. 223.

(3) (1857) 3 K. & J. 271; (1858) 4 K. & J. 656.

KEKEWICH would lead one to the inference that it was right that it should be assigned, or that there was any antecedent agreement that it should be assigned.

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The question, therefore, depends on the document itself, and no doubt it is one requiring very careful consideration. By it Mr. Jude gives to Mr. Newsam the sole and exclusive right of printing and publishing the series of "Music and the Higher Life," and issuing the same in volume form, upon three conditions. The first is that the cost of printing and issuing the volume is to be borne by Mr. Newsam. That was a change from the existing arrangement. For the future Mr. Jude is relieved of that, and it may be that one ought to find in that some consideration for the assignment of the copyright. At any rate that does not seem to me in any way inconsistent with the assignment of the copyright. By the second clause Mr. Newsam was to pay Mr. Jude 6*d.* on every copy sold. That obviously is quite consistent with an assignment of the copyright—the consideration which Mr. Newsam was to pay for that. It is equally consistent, of course, with the publishing agreement, as the first is. Then comes the third, which creates, to my mind, the great difficulty. Mr. Newsam is to supply to Mr. Jude such copies as he may require from time to time at 1*s.* 6*d.* a copy, those copies not being, of course, counted among those which Mr. Newsam was to pay royalty upon. That is the obligation; there was no obligation upon Mr. Newsam to publish except so far as Mr. Jude required copies to be made over to him at 1*s.* 6*d.* apiece, but he was bound to do that.

Now is it right, with those conditions, to treat this as a publishing agreement, or is there an assignment of the copyright? To my mind, the question is settled by the decision of Wood V.-C. in *Stevens v. Benning* (1), which was affirmed by the Court of Appeal. Wood V.-C. had an agreement of a similar character to deal with. I admit that there is a difficulty here raised from the addition of the words "sole and exclusive," and it is a fair argument to say that if those words "sole and exclusive" had been found in the agreement in *Stevens v. Benning* (1) the result would have been different, but I cannot myself adopt that

(1) 1 K. & J. 168; 6 D. M. & G. 223.

argument. The reasoning of the Vice-Chancellor seems to me to go to a case in which the words "sole and exclusive" occur quite as much as to one in which "sole and exclusive" do not occur. The difficulty is this. Mr. Jude purports to make over the sole and exclusive right of printing and publishing the series of "Music and the Higher Life" and issuing the same in volume form, and it is difficult at first sight to see why that should not be really the equivalent of copyright. The Act of 1842 says that "copyright" shall be construed to mean "the sole and exclusive liberty of printing or otherwise multiplying copies." The words "otherwise multiplying" are not here; "publishing" is, but there is "the sole and exclusive right of printing and publishing," which cannot be regarded as a large departure from the words "otherwise multiplying." We therefore have something very nearly approaching a use of the very words of the Act of Parliament, and the Act of Parliament says "copyright" shall be construed to mean that. If that is to be accepted as a definition, an exact equivalent, then, of course, it would be impossible to get out of it, and you might use any words that the Act of Parliament said are equivalent to "copyright," and "copyright" could be properly substituted for them and the document have to be construed in that way. But I cannot myself read that as a definition in that sense. It is an interpretation of the meaning of the word "copyright," and "copyright" really means something more than what is said there. It is interpreted to mean that, but that is not a definition in the strict technical scientific sense; it is not an exhaustive account of what is contained in the word "copyright." That is entirely Wood V.-C.'s opinion, as explained in *Stevens v. Benning*. (1) "Then it is argued," he says, "that the sole power of printing, re-printing, and publishing"—he uses the word "publishing," which is here—"is, in fact, the copyright. And no doubt, if an author, in consideration of a sum of money paid to him, agrees that certain persons shall have the sole power of printing, re-printing, and publishing a certain work for all time, that would be parting with the copyright; but if the agreement is that the publishers, performing certain conditions on their part, should, so long as they do

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KEKEWICH perform such conditions, have the right of printing and publishing the book, that is a very different agreement." I will stop there for a moment. I turn to the contract that we have under consideration here. Passing over conditions 1 and 2, the third condition obliges Mr. Newsam to supply Mr. Jude with certain copies at a certain price. That he is under no obligation whatever to print other copies is consistent with an assignment of the copyright, because a man who is the owner of a copyright is not bound to publish; he may buy up a book for the purpose of keeping it out of the market, and may not use the power which the assignment gives him of publishing and printing it in the future. But here he is under a condition to supply, and he is obliged to supply certain copies at a certain price. Suppose he refused, could it be said that the assignment of the copyright was to take effect and that Mr. Jude had only a right of action for non-fulfilment of the agreement? It seems to me impossible. "Copyright" implies, as the Vice-Chancellor says—and it is to be found in many cases—the right for all time, not a right which may be defeated by conditions, but a right for all time, and under all circumstances.

That seems to me to be a very strong argument in favour of this not having been intended to be, and not being properly construed as an assignment. I will now read what the Vice-Chancellor said in the words following the passage which I read before (1): "The legitimate inference from this contract is, that, so long as the publishers duly and properly perform their duty with reference to all that they have engaged to do, Mr. Forsyth should not be at liberty to defeat the benefit of his own agreement, by publishing a new edition before the former editions are sold off." That seems to me to fit this case exactly.

Now, that being so, it does seem strange at first to say that persons using here the very words of the Act, or something so nearly approaching the words here as to be indistinguishable in substance, should not be entitled to say that they meant copyright; but Wood V.-C. is not the only judge who has said in substance what I am now going to read (2): "In the contract, however, no mention is made of copyright, which is a

(1) 1 K. & J. 174.

(2) 1 K. & J. 173.

right so well known and defined that I should expect, if it was intended to part with it, the intention would have been clearly expressed." If, that is, they intended to assign the copyright, why not assign the copyright in so many words? Why beat about the bush to find other words, even if those words are contained in the interpretation clause of an Act of Parliament? Why not assign the copyright? And if the copyright is not assigned in those words, or rather in that word, there must be a possibility of a latitude of construction.

The circumstances here seem to me to point to a publishing agreement, and not to an assignment of copyright, and I am quite content to rely on the decision of *Wood V.-C.*, affirmed by the Court of Appeal, and am not sorry to find an authority which justifies me in coming to that conclusion.

That point is of great importance for this reason. The three other works which have been registered, about which the action is concerned, all contain some songs which are contained in "*Music and the Higher Life*." The result is that there is a sort of over-lapping of rights, and if the copyright in "*Music and the Higher Life*" had been properly assigned to Mr. Newsam and through him to Reid Brothers, Limited, they could prevent the publication of the other books, the publication of which would be an infringement of their right as regards "*Music and the Higher Life*."

There is another point put forward which I must deal with. It is said that there is an assignment through a mortgagee, a Mr. Riley, who advanced 100*l.* to Mr. Jude, that he took an agreement which is equivalent to a mortgage with a power of sale at the end of twelve months, and that before the power of sale became exercisable he assigned his mortgage to Mr. Newsam, who paid off the 80*l.* remaining due out of the 100*l.*, 20*l.* having been found by Mr. Jude. It is attempted on behalf of the respondents to establish that there was a sale under a power of sale, which, of course, would pass the property and discharge the equity of redemption. The document is so conclusive against it that I propose to dismiss the argument in a few words. Mr. Riley assigns his rights under the mortgage. That is a proper way of assigning a mortgage; it is not a proper way of conveying the

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KEKEWICH property discharged from the equity of redemption. When a mortgagee assigns his rights, what are they? His rights are to hold the property as security for the money due to him, subject to the equity of redemption. It matters not whether at that time for this purpose the assignee was a stranger or a person entitled to redeem. All that Mr. Riley did was to assign his rights.

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Then comes the question about the registration of these three documents. Now I may take them all together, because, though one was registered in April, 1903, another on August 13, and the other on August 19, and therefore there was a considerable gap between the first and the second, and there were conversations, and of course transactions, as regards all three separately, yet they all depend really upon one class of evidence. Mr. Jude has been examined and cross-examined, and he has been bound to admit that his memory is impaired by illness, and one must regard his evidence from that point of view. He was at first disposed to ignore the registration altogether, but on cross-examination he was bound to admit many facts and much knowledge, which points to his having been a party in one sense to the registration of all these three books; and there is no doubt that they were intended to be registered, taking Mr. Newsam's evidence (who again I regard also as a thorough witness of truth) that it was contemplated by both parties that there should be registration here and also in America. The registration was perfected as regards two in America; as regards the third not, but that was intended to be done.

I have listened to the evidence, and I find not a word of statement by Mr. Newsam that there was an antecedent agreement that these books should be registered in his name or in the name of Reid Brothers. He is very positive that there was an arrangement that they should be registered, and he gave us an account of how an arrangement was arrived at and the reasons for it, the suggestion which fell from him pointing to an assent of Mr. Jude to it. So far I follow him entirely, but he did not swear, and I am sure he did not swear because he knew he could not properly swear, that it was arranged that they should be registered in his name; but they were registered in his name, or

rather in that of Reid Brothers, and the question is whether that was sanctioned by Mr. Jude. The sanction depends entirely upon this, that after the registration, there having been conversations before, Mr. Newsam shewed Mr. Jude the receipts from the Stationers' Hall office here and also the documents, which I also call receipts, though they are not quite in that form, which came from America. Now those documents which came from America shewed Reid Brothers as the persons in whose names the registration had been effected, and that is something, no doubt, in favour of Mr. Newsam's view. The three receipts from the Stationers' Hall office here do not. Each of them mentions Reid Brothers as the persons from whom the application to register had been received, but neither of them says that the application was to register in the name of Reid Brothers. In the first place, I think it is extremely unlikely that Mr. Jude paid much attention to those documents. He knew that there was to be registration, but I must take it he did not know that they were intended to be registered in the name of Reid Brothers. He swears positively himself that it was to be registration for him and not for Reid Brothers, and I think it would be going much too far to say that a mere shewing to him of the receipts of the registration would be equivalent to obtaining his sanction to the registration in the name of Reid Brothers, even if that had been specified on the face of them. I cannot think that merely shewing these documents to him, or even his giving his assent to them at the time merely in that way, is equivalent to a sanction by him of the registration in the name of Reid Brothers.

That gets rid of a great part of the case, but one point is made which deserves attention. It is said that you may enter an assignment on the register. There is no question about it. Not only is that recognized by authority, but the Act of Parliament itself says in s. 13: "It shall be lawful for every such registered proprietor to assign his interest, or any portion of his interest therein, by making entry in the said book of registry of such assignment."

What is to be entered is the assignment. It has no application whatever to an original registration. If this had been originally

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KEKEWICH registered in the name of Mr. Jude and then an assignment of it after, one would have found that assignment by an entry in the register, but if you have an assignment before a registration that assignment must be in writing quite independently of the registration. There is nothing here at all to justify the suggestion that there was an assignment of the copyright of these three books to Reid Brothers by the entry.

It is not necessary for me to consider what is the exact meaning of the words "making entry." I take it that a man may make an entry, as he may do almost anything else, by the hand of some other person. He might have authorized Mr. Newsam to make the entry for him, and of course he might have authorized Mr. Newsam, as I hold he did not, to register these books in his name. He might have made an entry of an assignment through Mr. Newsam, but it would be an entry of an assignment. If you look at the registration here there is not a word about assignment. It is an original registration, and the argument on the words in the Act respecting an entry of assignment on the register has no application whatever. The result is that the applicant is entitled to the relief which he asks.

Solicitors: *James White & Leonard; Gibbs, White & Strong.*

G. M.

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Aug. 4, 7.

[1906 H. 104.]

*Mortgage—Consolidation—Equities—Express Contract—Contrary Intention—
Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 17.*

A mortgage to the defendants of leasehold property, M., contained a provision that the mortgagor should not be entitled to redeem without first paying all moneys that might be secured to the mortgagees by any other mortgage executed by the mortgagor. The mortgagor then mortgaged another leasehold, R., to the defendants, and the day after gave a second mortgage of it to the plaintiffs. Of this mortgage the defendants had notice. He subsequently gave two further mortgages of different properties to the defendants.

In an action by the plaintiffs, as second mortgagees, to redeem R. :—

Held, that the defendants, as first mortgagees of R., were entitled to consolidate their prior mortgage on M. with their mortgage on R., but not the two mortgages subsequent in date to the plaintiffs' mortgage.

Hopkinson v. Rolt, (1861) 9 H. L. C. 514, applied.

THE plaintiffs were the surviving trustees of the will of George Martin Hughes. They held a second mortgage of a leasehold messuage and premises called Rocklea at Sydenham. The action was brought to test the question whether the defendant society, who were first mortgagees of Rocklea, could, as against the plaintiffs, consolidate their first mortgage with mortgages on other properties subsequent in date to the plaintiffs' security. By a lease dated March 26, 1885, the Corporation of London granted to the defendant Robert James Worley the messuage and premises known as Rocklea, Sydenham, in the county of Kent, for a term of eighty years from September 29, 1883, at the yearly rent of 14*l.* By an indenture of mortgage of May 8, 1895, between R. J. Worley, who was a member of the defendant society, and Windsor Amsted and Samuel Rogers (the trustees of the society) in consideration of the sum of 900*l.* paid to R. J. Worley, he, as beneficial owner, demised to the trustees of the Society all the premises comprised in the lease of Rocklea, to hold the same to

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the trustees for the residue of the term of eighty years, except the last two days, to secure the payment of the subscriptions, fines, and other payments under the rules of the society. By an indenture of May 9, 1895, made between R. J. Worley and the plaintiffs, the messuage and premises comprised in the lease of Rocklea were demised to the plaintiffs for the residue of the term of eighty years, except the last day, subject to the indenture of May 8, 1895, and the subscriptions, fines, and other moneys thereby secured, to secure a sum of 7160*l.* and interest.

The defendant society and the trustees thereof had notice of this mortgage of May 9, 1895, immediately after its execution. There was now due to the plaintiffs from R. J. Worley the sum of 6714*l.* 9*s.* 10*d.* On July 31, 1905, in exercise of the power of sale contained in their security, the defendant society sold Rocklea to the plaintiffs for 900*l.*, and the messuage was duly assigned to them. There were various sums due to the defendant society upon other mortgages from Worley. The first of these mortgages was one dated August 13, 1894, and was a mortgage by Worley of the lease of No. 11, Manchester Avenue, for the residue of a term of eighty years, except the last day, and it contained a declaration that the mortgagor should not be entitled to redeem it without first paying to the trustees of the defendant society all subscriptions or other moneys that might be secured to the trustees by any other mortgage executed by the mortgagor, or by any person through whom he might claim. Upon this mortgage, a sum of 87*l.* 16*s.* was due. There was a sum of 687*l.* 1*s.* due upon a mortgage by Worley, of No. 9, Manchester Avenue, dated December 23, 1897, and containing a similar consolidation clause. And a further sum of 411*l.* 6*s.* was due from Worley upon a mortgage by way of further charge on Nos. 9 and 11, Manchester Avenue, dated August 31, 1901, and this also incorporated the consolidation clause.

By their pleadings the plaintiffs did not object to the defendant society consolidating the mortgage of August, 13, 1894, with their mortgage of May 8, 1895, but, at the trial, this was withdrawn, and the defendants amended by claiming the right to consolidate. The plaintiffs now claimed a declaration that they were, immediately prior to the sale thereof, entitled to redeem

the messuage and hereditaments comprised in the mortgage of May 8, 1895, on payment of what should be found due, and that accounts should be taken. The defendants claimed to be entitled to consolidate, not only the mortgage of August 13, 1894, but also, having regard to the provision as to consolidation contained in that deed, the other two mortgages of December 23, 1897, and August 31, 1901, with their mortgage of May 8, 1895. The defendant R. J. Worley did not appear, and there was a motion for judgment as against him.

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Stewart-Smith, K.C., and *E. F. Ball*, for the plaintiffs. The case is one of conflicting equities. Under s. 17 of the Conveyancing and Law of Property Act, 1881, the general rule as to the consolidation of mortgages is done away with only if and so far as a contrary intention is not expressed in the mortgage deeds or one of them. It is a question whether the provision in the mortgage deed of August 13, 1894, is a clear expression of a contrary intention within the Act as against the plaintiffs, who are not parties to the deed. The general principle with regard to this question is referred to in the case of *Harter v. Colman*. (1) Fry J. there says (2): "Must the assignee of the equity of redemption do all such equities as his assignor would have been liable to at the time when the redemption action was brought, or must he perform, and hold subject to, those equities only to which his assignor was liable at the date of the assignment?" And he held that the equities to be performed by the assignee of an equity of redemption were those to which his assignor was liable at the date of the assignment.

If the equities are in separate hands, then there cannot be consolidation. The case of *Jennings v. Jordan* (3) applies, and covers this case. It was held there that the right of a purchaser of an equity of redemption cannot be affected by a mortgage created after the purchase; and the assignee was entitled to redeem the first mortgage without redeeming the second.

P. O. Lawrence, K.C., and *H. B. Howard*, for the defendant society. The law of consolidation is really not disputed, but the

(1) (1882) 19 Ch. D. 630.

(2) 19 Ch. D. 633.

(3) (1881) 6 App. Cas. 698.

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 —

present case is outside it, being a case of an express contract contained in the mortgage of August 13, 1894. It is clear that the defendants are entitled to claim that this mortgage should be redeemed, and that carries with it the claim to consolidate the other two mortgages. The mortgagor and mortgagee can come to an agreement whether the mortgagor assigns his equity of redemption or not. The assignee takes subject to the same equities as the assignor. The contract is one binding upon the "assigns." The cases cited do not help the plaintiffs; they were both cases of equitable claims, and this is one of special contract.

Stewart-Smith, K.C., in reply. If the contention of the plaintiffs is allowed a mortgagor may create by contract concealed rights.

Cur. adv. vult.

Aug. 7. KEKEWICH J. The plaintiffs are second mortgagees of a property called Rocklea. The defendants (meaning the benefit building society) are first and legal mortgagees of the same property. It has been sold, and this action is concerned with questions arising on the distribution of the proceeds of sale, but the rights of the parties are not in the slightest degree affected by the conversion, and remain just the same as if the action were for the redemption of the property itself. On what terms are the plaintiffs entitled to redeem? The answer to this question is in the main simple enough, and there is no difficulty in framing the proper accounts. But the defendants hold mortgages of other properties granted by the defendant Worley, the mortgagor of Rocklea, and they insist on being entitled to consolidate their other mortgages, that is to say, they insist that the plaintiffs cannot be allowed to redeem the mortgage on Rocklea without at the same time redeeming the other mortgages also. The first of these other mortgages is one prior in date to the plaintiffs' mortgage, and by their statement of claim they submitted and offered to redeem that. At the Bar they asked leave to withdraw that offer, and an amendment was allowed on the terms of the defendants being allowed to amend their defence by claiming this consolidation as a matter of right. The claim is unquestionably sound. Treating s. 17 of the

Conveyancing Act, 1881, as, for the moment, out of the way, the law is settled that a mortgagee of property A. is entitled, as against a puisne mortgagee of that property, to consolidate with his mortgage of A. a mortgage of B., prior in date to that of the puisne mortgage created by the same mortgagor. He has that equity against the mortgagor, and the puisne mortgagee cannot stand in any better position. No more need be said, because the law is admitted to be established, and is expounded in *Jennings v. Jordan*.⁽¹⁾ All the mortgages are subsequent to the Conveyancing Act, 1881, and by s. 17 of that Act the right of consolidation is taken away, but only where a contrary intention is not expressed in the mortgage deeds, or one of them. One or two observations occur. First, there is no alteration in the law, if a contrary intention is expressed, and the law remains as expounded in *Jennings v. Jordan*.⁽¹⁾ Secondly, although the Act speaks only of a mortgagor seeking to redeem, the puisne mortgagee claiming under him must be governed by the same rule, because, as already said, his equity cannot be greater than that of the mortgagor himself. Is a contrary intention expressed in the prior mortgage which is a mortgage of 11, Manchester Avenue, and is dated August 13, 1894? It contains a provision in these terms: "The mortgagor shall not be entitled to redeem this present mortgage without paying to the trustees" (meaning the trustees of the defendant society) "all subscriptions, or other moneys, that may be secured to the trustees by any other mortgage executed by the mortgagor, or by any persons through whom he may claim." It would be difficult to find an intention more clearly expressed, and the only observation on it on the part of the plaintiffs was that they were not parties to this contract. Of course they were not. The facts of the case, or of any like case, preclude their being parties, and the origin of the rule, viz., the subjection of those claiming through the mortgagor to the equitable obligations on him, presupposes the absence of priority. The plaintiffs are bound to redeem this mortgage as a condition of being allowed to redeem that on Rocklea.

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There is a further question. The defendants hold two other

1) 6 App. Cas. 698.

KEKEWICH mortgages created by the same mortgagor, both subsequent in date to the plaintiffs' mortgage of Rocklea, and they claim to be entitled to consolidate these also. That is, they say that the plaintiffs cannot be allowed to redeem the mortgage on Rocklea without at the same time redeeming the two subsequent mortgages. It is clear that the mortgagor himself would be bound to submit to this claim. By the mortgage of August 13, 1894, he has expressly contracted that he shall not be entitled to redeem that without first paying whatever is due on any other mortgage executed by him, and he must, therefore, satisfy the subsequent mortgages before he can call for a reconveyance of the property comprised in the mortgage of August 13, 1894. His obligation may with convenience be expressed in another form. By the provision in the mortgage of August 13, 1894, above set out, he has contracted that any money due from him under any other mortgage shall be secured on the property comprised in that mortgage, and therefore, whatever is due under the subsequent mortgages is secured on 11, Manchester Avenue, and must come into the account of what is due on the mortgage of that property. It follows that the mortgagor could not redeem the mortgage of Rocklea without redeeming the mortgage of 11, Manchester Avenue, and also the subsequent mortgages, the sums due under which were, by the express contract between him and his mortgagee, charged on that property. But is the puisne mortgage of Rocklea subjected to the same condition? Apart from the express contract, he is unquestionably not so subjected. The point arose for decision and was decided in *Jennings v. Jordan*. (1) Lord Blackburn says (2): "I take it that the only question before this House is, whether, where the mortgage on one property is not created till after the equity of redemption in the other property has been parted with, there is, as against the purchaser, an equity to consolidate the two"; and the question thus stated was answered in the negative. I will not quote further from *Jennings v. Jordan* (1), but reference may usefully be made to some passages in the judgment of Fry J. in *Harter v. Colman* (3), where he says this (4): "It appears to

(1) 6 App. Cas. 698.

(3) 19 Ch. D. 630.

(2) Ibid. 714.

(4) Ibid. 634.

me that the Courts have laid down the principle that the equities to be performed by the assignee of an equity of redemption are those to which his assignor was liable at the date of the assignment." And again he says (1): "I repeat that my decision rests on this—the purchaser of an equity of redemption from the mortgagor takes it subject to all the equities which affected it in the hands of the assignor at the time of the assignment, but not to any equities subsequently arising. The equity to consolidate arising from a subsequent union in the same person of that mortgage with another, is not an equity which was then subsisting, and therefore it is not one of the equities subject to which the equity of redemption was purchased." But then comes in the express contract which the defendants urge precludes the plaintiffs from saying that this general rule is applicable. As regards this contention, it must be remembered that the defendants had, as is admitted, distinct notice of the mortgage to the plaintiffs immediately after its execution, and before the creation of the subsequent mortgages. Are they at liberty, notwithstanding this notice, to rely on the express contract as entitling them to add to the amounts secured on 11, Manchester Avenue, what was advanced on the security of the subsequent mortgages? In my opinion *Hopkinson v. Rolt* (2) is a clear and conclusive authority against this contention. It was there decided (I quote from the head-note) that "A first mortgagee, whose mortgage is taken to cover what is then due and also future advances (within a fixed amount), cannot claim the benefit of such advances in priority over a second mortgagee, of whose mortgage he had notice at the time of its execution, and before he made these new advances." The only distinction between that case and this lies in the fact that here the further advances were made not merely on the security of the mortgage of 11, Manchester Avenue, but were also made on the security of the properties respectively comprised in the subsequent mortgages. That, to my mind, makes no difference. The equities cannot be altered by the fact that the mortgagee, when making further advances, stipulated for further security. The further advances were made on the security of 11, Manchester Avenue, equally as

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(1) 19 Ch. D. 638.

(2) 9 H. L. C. 514.

KEKEWICH much as if no further security had been required, and the defen-
 J. dants rest on the contract that they should be secured on 11,
 1906 Manchester Avenue, the substance of the contract being such as
 ~~~~~ I have described. It matters not that the form of it was different  
 HUGHES from that which was dealt with in *Hopkinson v. Rolt*. (1) As  
 v. between the plaintiffs and defendants, the question remains the  
 BRITANNIA same whether a first mortgagee is entitled, as against a second  
 PERMANENT mortgagee, of whose mortgage he has had notice, to say that the  
 BENEFIT second mortgagee cannot redeem him without paying all that  
 BUILDING is due under mortgages created subsequently to the date of the  
 SOCIETY. second mortgage, because he is bound to redeem a mortgage of  
 — prior date which, by express contract, covers the sums advanced  
 on the security of these subsequent mortgages. Principle and  
 authority alike are adverse to any such conclusion. The accounts  
 between the plaintiffs and defendants must therefore be taken on  
 the footing that the plaintiffs cannot redeem the mortgage of  
 Rocklea without also redeeming the mortgage of 11, Manchester  
 Avenue, that is, paying whatever is due in respect of the original  
 advance under the mortgage of August 13, 1894, but are not  
 bound to pay what is due under the mortgages of subsequent  
 date.

Solicitors : *Hughes, Hooker & Co.* ; *Poole & Robinson*.

(1) 9 H. L. C. 514.

G. M.



## ROBERTSON v. PURDEY.

BUCKLEY  
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[1906 R. 143.]

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*Patent—Action for Infringement—Discontinuance—Terms on which allowed—  
 Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), ss. 18,  
 19, 20—Patents, Designs and Trade Marks Act, 1888 (51 & 52 Vict.  
 c. 50), s. 5—Rules of the Supreme Court, 1883, Order xxvi., r. 1.*

The plaintiff having brought an action for an injunction to restrain infringement of his letters patent for an invention, and the defendant having delivered his defence with particulars of objection, the plaintiff delivered his reply. Defendant then gave notice of an application for liberty to amend his particulars by stating certain alleged defects in the specification, but abandoned the application. The notice of application disclosed to the plaintiff something which assured him that he could not succeed in the action unless he corrected his patent, and with a view to doing this he applied for leave to discontinue the action:—

*Held*, that leave should only be given on the terms of the plaintiff not bringing any action against the defendant in respect of any infringement alleged in the present action, and paying the costs of that action, including the costs of the particulars of objection.

THE plaintiff John Robertson (carrying on business as Boss & Co.) sued James Purdey (carrying on business as James Purdey & Sons) for an injunction to restrain an alleged infringement of letters patent No. 22894 of 1894 for improvements in drop-down guns, and for an inquiry as to damages and other relief; and with his statement of claim delivered particulars of alleged breaches.

The defendant delivered a defence in which he alleged that he had not infringed the patent or threatened to infringe it, and that the patent was invalid by reason of the matters in the accompanying particulars of objections appearing. In his particulars of objections defendant alleged that the plaintiff was not the first and true inventor of the alleged invention; that the alleged invention was not new, but had been on several occasions anticipated; that the alleged invention was not the proper subject-matter of valid letters patent.

On May 27, 1906, the plaintiff delivered his reply.

On June 7 defendant gave plaintiff notice of an application, to

BUCKLEY be made on June 15, for liberty to amend the particulars of  
 J. objections by adding thereto statements that the alleged inven-  
 1906 tions as claimed in all the claiming clauses were useless and  
 ROBERTSON unworkable, and that the specification did not sufficiently  
 v. describe how any of the appliances illustrated with certain  
 PURDEY. figures could be made to work so as to produce a workable three-  
 pull single-trigger gun. The defendant abandoned that applica-  
 tion, but the notice of it so affected the plaintiff that he applied  
 for leave to discontinue the action.

*T. Terrell, K.C., and C. Terrell*, for the summons. A plaintiff has an absolute right to discontinue his action and bring another, although after the defence has been delivered he cannot do so without leave: Order xxvi., r. 1. If we had not delivered a reply we could have discontinued on the application of the defendant for liberty to amend his particulars of objections. The amended particulars shewed a defect in our specification which we could not get rid of. Disclaimer would not be enough. We should have to correct the specification under ss. 18 and 19 of the Patents, Designs and Trade Marks Act, 1883. (1)

(1) Sects. 18, 19 and 20 of the Patents, Designs and Trade Marks Act, 1883, as amended (in s. 18) by s. 5 of the Patents, Designs and Trade Marks Act, 1888, are, so far as material, as follows:

"18 (1.). An applicant or a patentee may, from time to time, by request in writing left at the Patent Office, seek leave to amend his specification, including drawings forming part thereof, by way of disclaimer, correction, or explanation, stating the nature of such amendment and his reasons for the same."

"10 [as amended in 1888]. The foregoing provisions of this section do not apply when, and so long as any action for infringement or proceeding for revocation of a patent is pending."

"19. In an action for infringe-

ment of a patent . . . the Court or a judge may at any time order that the patentee shall, subject to such terms as to costs and otherwise as the Court or a judge may impose, be at liberty to apply at the Patent Office for leave to amend his specification by way of disclaimer, and may direct that in the meantime the trial or hearing of the action shall be postponed."

"20. Where an amendment by way of disclaimer, correction, or explanation, has been allowed under this Act, no damages shall be given in any action in respect of the use of the invention before the disclaimer, correction, or explanation, unless the patentee establishes to the satisfaction of the Court that his original claim was framed in good faith and with reasonable skill and knowledge."

Sect. 20 shews that the Act contemplated that a man should be able to bring another action for the same infringement after he had discontinued his first action. There is no doubt that on giving leave to discontinue the Court can impose terms: *Chamberlain & Hookham, Ltd. v. Huddersfield Corporation*. (1) The only question is what are the terms, if any, which should be imposed in the circumstances of the case. In the absence of special circumstances there is no reason for making it a term that we should not sue the defendant again for the same infringement: *Hess v. Labouchere* (2); *Deeley v. Perkes* (3); *Ludington Cigarette Machine Co., Ltd. v. Baron Cigarette Machine Co., Ltd.* (4); *Haskell Golf Ball Co., Ltd. v. Hutchison*. (5)

[BUCKLEY J. The only question is what are fair terms to impose.]

Sect. 20 gives the defendant ample protection. It would be a sufficient term and order that the plaintiff should pay the costs up to the time of discontinuance: *Kerr & Hoegger, Ltd. v. Crompton*. (6)

[They also referred to *Allen v. Doulton & Co.* (7)]

A. J. Walter, for the defendant. The proper terms to be imposed are payment of costs and that no fresh action shall be brought in respect of the infringements alleged in the present action: *Chamberlain & Hookham, Ltd. v. Huddersfield Corporation*. (1) The object of the present application is to effect by a side wind what cannot be done directly—that is to say, the correction of the specification while the action is going on: *In re Owen's Patent*. (8)

[He also referred to *In re Alsop's Patent*. (9)]

C. Terrell, in reply.

BUCKLEY J. This is an application by the plaintiff in the action that he be at liberty to discontinue. After defence he took a further step in the action by delivering a reply, and

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- (1) (1901) 18 Rep. Pat. Cas. 454.
- (2) (1898) 14 Times L. R. 350.
- (3) [1896] A. C. 496; 13 Rep. Pat. Cas. 581.
- (4) [1900] 1 Ch. 508; 17 Rep. Pat. Cas. 214.

- (5) (1905) 22 Rep. Pat. Cas. 205.
- (6) (1901) 19 Rep. Pat. Cas. 9.
- (7) (1887) 4 Rep. Pat. Cas. 377.
- (8) [1899] 1 Ch. 157.
- (9) [1906] 1 Ch. 85; 23 Rep. Pat. Cas. 65.

BUCKLEY consequently, under Order xxvi., r. 1, he can only discontinue  
J. with leave, and the Court can give leave on such terms as to  
1906 costs and as to any other action and otherwise as may be just.

ROBERTSON After the plaintiff had delivered his reply, the defendant  
v. on June 7 gave notice of an application to be made on June 15  
PURDEY for leave to amend his particulars of objections. The defendant  
afterwards abandoned the application, but Mr. Thomas Terrell,  
in opening the case before me, said very frankly that the notice  
of application for leave to amend the particulars of objections  
disclosed to the plaintiff something which assured the plaintiff  
that he was himself wrong, and that his action would fail unless  
he could, not disclaim, but make a correction in his patent. He  
has said quite frankly at the Bar that what he wants to do is not  
to disclaim, which under s. 19 of the Patents, Designs and Trade  
Marks Act, 1883, he could do with leave pending the action, but  
to correct, which, under that section as it has been construed,  
the judge could not give him leave to do pending the action.

The question for decision is whether, in that state of facts, I  
ought or ought not to impose, as part of the terms, that he shall  
not bring any other action against the defendant in respect of  
any infringement alleged in the pleadings in the action.

In my judgment I ought to impose that term, and for this  
reason: After an action has been brought for infringement, s. 19  
of the Act provides that the Court or a judge may, on terms,  
allow the plaintiff the patentee to amend his specification by way  
of disclaimer, but it has been decided that that section does not  
extend so as to allow an amendment by way of correction or  
explanation. So that in this pending action the patentee could  
not, with any leave which the Court could give him, sue upon a  
corrected patent, but must in this action sue upon an uncorrected  
patent, and if upon the uncorrected patent he would fail, he  
must fail.

That being the case, if I were to give the plaintiff leave to  
discontinue this action without imposing the term in question  
I should be leaving him in a position to bring a subsequent  
action in which he could sue upon the same footing as if in this  
action I had given him leave to correct his patent, which is the  
very thing which, under the Act of Parliament, I cannot do.



In other words, he wants leave to discontinue this action upon the terms that he shall be at liberty to bring a subsequent action with a cause of action open to him which could never be open to him in this action.

It seems to me that that would be unjust. Of course, upon this application for leave to discontinue the action, the sections of the Act of Parliament are in a sense not applicable at all. I am not deciding anything under the Act, but I have to consider how my judicial discretion ought to be exercised, bearing in mind what the effect of the Act is if this action goes on. In that sense it seems to me that, if I were to give leave to discontinue this action without imposing this term, I should be, so to speak, repealing the Act of Parliament; I should be enlarging s. 19 so as in substance, although not in form, to allow the plaintiff in the action to correct his patent pending the action. That is the very thing which the statute, as construed, says I ought not to do.

I think, therefore, the proper order to make is to give the plaintiff leave to discontinue this action upon the terms that he shall not bring any other action against the defendant in respect of any infringement alleged in this action, and that he shall pay the defendant his costs of the present action, with a direction to include therein the costs of the defendant's particulars of objections as if they had been certified as reasonable and proper at the trial. If the plaintiff will not accept those terms, there will be no order on this application except that the costs be the defendant's costs in any event.

The plaintiff decided to run the risk and proceed with the present action.

Solicitor for plaintiff: *George Cheesman*.

Solicitors for defendant: *Ellis & Ellis*.

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Aug. 8, 9.

*In re* WESTON'S SETTLEMENT.  
NEEVES *v.* WESTON.

[1906 W. 871.]

*Power—Special Power—Exercise by Will—Use of Word “Appoint”—Indications of contrary Intention.*

By a settlement, made in 1863 on the marriage of W. and X., leasehold hereditaments were settled upon trust, after the decease of the survivor of them, for all and every the children and child of the marriage in such parts and shares as the survivor should by will or codicil appoint.

W. survived X., and by his will, after making bequests of a watch, a picture, and an organ, he gave, devised, bequeathed, and appointed all the residue of his “estate,” “real as well as personal,” unto trustees, upon trust to convert into money such parts of “the said trust premises” as should not consist of money, and out of the proceeds to pay his funeral expenses and debts, and to pay and divide the residue of “such trust moneys and premises unto and equally between” his sons A., P., and R. (declaring that he made no provision for his other children because they were sufficiently provided for). The testator then empowered his trustees to postpone the conversion of his “real and personal estate” for so long as they should think proper, and during the postponement to manage, lease, or let his “real and leasehold estates,” and out of the capital or income thereof to make any proper outlay for improvements, repairs, insurance, or otherwise for the benefit of his “real or personal estate,” but declared that no property not actually producing income which should form part of his estate should be treated as producing income. The testator also declared that the trustees might invest the “trust moneys representing the shares” of P. and R. during their respective minorities in certain specified securities, and that during their minorities the trustees should pay the whole income of those shares to A. as their guardian for their maintenance:—

*Held*, that the will did not operate as an exercise of the special power given by the settlement.

*In re Cotton*, (1888) 40 Ch. D. 41, followed.

*In re Mayhew*, [1901] 1 Ch. 677, distinguished.

By an indenture dated September 11, 1863, being a settlement executed on the marriage of Alfred Richard Weston and Jane Janetta Hannah Lowe, certain leasehold hereditaments were settled, upon trust, after the solemnization of the marriage, to pay the income to the wife for her separate use for life, and after

her death to A. R. Weston for life, and, immediately after the decease of the survivor of them then "Upon trust for all and every the children and child of the said intended marriage in such parts and shares as the survivor . . . . should by his or her last will and testament or by any codicil thereto direct, appoint give or bequeath the same and for want of and subject to any such direction or appointment, gift or bequest" upon trust for all the children of the marriage who being sons should attain twenty-one, or being daughters should attain that age or marry, in equal shares as tenants in common.

Jane J. H. Weston, the wife, died on April 25, 1902, and Arthur Morley Weston and seven others were the surviving children of the marriage.

Alfred Richard Weston, their father, died on October 16, 1905, having made a will, dated September 9, 1903, which so far as material was as follows :

"I give and bequeath the following legacies, viz. to my son, Arthur Morley Weston, my organ, to my son Percival Gover Weston my large picture Cleopatra, to my son Reuben Alfred Weston my watch and chain, and as to all the rest, residue and remainder of my estate, of whatever description, and wheresoever situate, real as well as personal, and whether in possession, reversion, remainder, or expectancy, I give, devise, bequeath, and appoint the same unto and to the use of my said son Arthur Morley Weston and my friend Harry Watkins of No. 27, Chancery Lane. . . . their heirs, executors, and administrators respectively, according to the nature and tenure thereof, Upon trust that" they or other the trustees or trustee of the will "shall sell, call in, collect, or otherwise convert into money such parts of the said trust premises as shall not consist of ready money, and shall out of the moneys to arise from such sale, calling in, collection, and conversion, pay my funeral expenses and debts, and shall hold the residue of such trust moneys and premises, Upon trust to pay and divide the same unto and equally between my said sons, Arthur Morley Weston, Percival Gover Weston, and Reuben Alfred Weston. And I make no provision under this my will for my other children, they being sufficiently provided for. And I hereby declare that my trustees or trustee may postpone the sale, conversion, and collection of

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all or any part or parts of my said real and personal estate respectively for so long as they or he shall think proper . . . . and during such postponement my said trustees or trustee may manage and let upon lease or from year to year my real and leasehold estates and make out of the capital or income of my real and leasehold estates any outlay which my trustees or trustee may consider proper for improvements, repairs, premiums, or policies or otherwise for the benefit or in respect of my real or personal estate. And I declare that the net rents and profits or other income produced from every or any part of my real or personal estate previously to the conversion or collection thereof shall be applied in the same manner as if the same were income arising from investments hereinbefore [*sic*] authorized, and that all income produced from my estate in its actual condition for the time being, whether consisting of property or investments of an authorized or unauthorized description, and whether of a wasting or permanent character, shall, as well during the first year of my death, as at all times afterwards, be applicable as income under the trusts of this my will, no part thereof being in any event liable to be retained as capital, but no property not actually producing income which shall form part of my estate shall be treated as producing income or as entitling any party to the receipt of income. Provided always and I hereby declare that my trustees or trustee may invest the trust moneys representing the shares of the said Percival Gover Weston and Reuben Alfred Weston hereunder during their respective minorities" in certain specified securities. "And I hereby direct that my trustees shall pay the whole of the income of the shares of my said sons Percival Gover Weston and Reuben Alfred Weston hereunder during their respective minorities to my said son Arthur Morley Weston as their guardian for and on account of their support and maintenance."

A. M. Weston and Harry Watkins were appointed executors and trustees and proved the will.

An originating summons was taken out by Arthur Neeves, the sole surviving trustee of the marriage settlement, and the executors of the will of Alfred Richard Weston against the children of the marriage other than Arthur Morley Weston (who



was one of the plaintiffs) asking for the determination of the question whether by the residuary gift in his will Alfred Richard Weston had exercised the power of appointment vested in him by the marriage settlement.

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*Cairns*, for the plaintiffs.

*Buckmaster*, K.C., and *Harold Bompas*, for the defendants, except Percival Gover Weston and Reuben Alfred Weston. The residuary gift in the will of Arthur Richard Weston is not an exercise of the power of appointment given by the settlement. There is no reference in the will either to the instrument creating the power or to the property which is subject to the power, and the will throughout is inconsistent with what would be a proper exercise of the power.

No doubt the decision of Farwell J. in *In re Mayhew* (1) will be relied on in support of the opposite contention, but there were not in that case the numerous indications of a contrary intention which are to be found in the will in this case.

In *Kent v. Kent* (2) a will had been made which referred to the instrument creating the power and used the word "appoint." In a subsequent will the word "appoint" was used without there being any reference to the power, and it was held that the second will was an exercise of the power. There, again, the terms of the will shewed no such contrary intention as is manifest in the present case.

[BUCKLEY J. referred to *In re Hayes* (3) and to Theobald on Wills, 6th ed. p. 244.]

In *In re Cotton* (4) the word "appoint" was used in respect of the residuary estate, which was given to trustees upon trust for conversion, and, after payment of the testator's debts and funeral and testamentary expenses, to invest the net proceeds, and during the minority and spinsterhood of his only child, a daughter, for her maintenance and to accumulate the surplus, and on the daughter attaining twenty-one or marrying there was a gift to her for life with remainders over. North J. held that this was not an exercise of a power of appointment

(1) [1901] 1 Ch. 677.

(2) [1902] P. 108.

(3) [1901] 2 Ch. 529, 531.

(4) 40 Ch. D. 41.

BUCKLEY among the testator's children over property settled in default of appointment on the children at twenty-one or marriage.

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A general devise by a testator who has no real estate of his own is not a sufficient indication of an intention to exercise a special power to appoint real estate, although the objects of the power are included among the devisees: *In re Mills*. (1)

[They also referred to *In re Swinburne* (2); *Sykes v. Carroll*. (3)]

*Richard Nevill*, for the defendants Percy Gover Weston and Reuben Alfred Weston. In *In re Mayhew* (4) testatrix had a testamentary power of appointing a share of her father's personal estate among her nephews and nieces, and there was evidence that that was her only power of appointment. By her will she appointed trustees and executors, and bequeathed some legacies, and then appointed, devised, and bequeathed her real estate and the residue of her personal estate to the trustees upon trust for conversion, and to divide the proceeds (after paying her debts and funeral and testamentary expenses) equally between four named nephews and nieces; and Farwell J. held that the will was a good exercise of the power. That case is not distinguishable from the case now before the Court. Farwell J. relies upon the facts that the donees were objects of the power, that the testatrix had no other power, and that she had used "a word of art, prima facie having reference to powers only"—namely the word "appoint." He also points out that "it is plain on the authorities that a mere direction to pay debts out of the fund is not enough to negative an intention to exercise the power." *In re Swinburne* (2) is also an authority in our favour.

*Buckmaster, K.C.*, in reply.

BUCKLEY J. This testator at the dates of his will and of his death was entitled to a special power to appoint amongst his children. The question for decision is whether by his will he exercised the power.

For the exercise of a special power there must be either (1.) a reference to the power, or (2.) a reference to the property subject

(1) (1886) 34 Ch. D. 186.

(2) (1884) 27 Ch. D. 696.

(3) [1903] 1 I. R. 17.

(4) [1901] 1 Ch. 677, 679

to the power, or (3.) an intention otherwise expressed in the will to exercise the power. "The intention to exercise a special power," said Romer L.J. in *In re Hayes* (1), "must be gathered from the whole will. The cases do not lay down any general principles and are not easily reconcilable." This testator had no power other than this special power, and in his will he uses the verb "appoint." Those are the two circumstances relied on for the purpose of evidencing an intention to exercise the power. In these circumstances I must read the whole will, and if I find indications negating the intention, then, quoting Pearson J. in *Von Brockdorff v. Malcolm* (2), "there being various indications in the will, some one way and some the other, the question I have to decide as well as I can is, on which side does the balance weigh most strongly." Looking at the will, I find that the beneficiaries are entitled to have divided among them what the testator calls "the residue of such trust moneys and premises." It is upon those words that the title of the appointees rests. If they are entitled to the property which was subject to the power, it must be because it is within the words "such trust moneys and premises." Now, I find that the testator directs the conversion into money of such part of "the said trust premises" as shall not consist of money. These are the trust premises which are presently called "such trust moneys and premises." The trust is for conversion of all the trust premises other than such as consist of money. As regards the property subject to the power, he could not direct its conversion. Either, therefore, he has directed the conversion of the property subject to the power—which he could not do—or that property is not within the words "trust premises." In this I find a first indication that he was not dealing with the property which was subject to the power. Then he gives his trustees power to postpone the conversion "of my said real and personal estate." The original words of gift were of "my estate real as well as personal." "My said real and personal estate," therefore, logically means "all that which I have above called my estate real as well as personal." If he was disposing of the property which was subject to the power, he was here giving

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(1) [1901] 2 Ch. 531.

(2) (1885) 30 Ch. D. 172, 179.

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power to postpone the conversion of that property. But he had no power to direct either its conversion or the postponement of its conversion. This is a second indication that he was not dealing with the property the subject of the power. Then there is a power to manage and let "my real and leasehold estates," a direction relating to income as regards property which is not actually producing income, and a declaration that the trustees are to invest "the trust moneys representing the shares" of two of the persons who take beneficially under his will during their minority. He had no power to direct the investment of the property which was subject to the power. He here treats the share of the beneficiary in the aggregate sum as being property as to whose investment he is competent to give directions.

Reading the whole will, therefore, I find the verb "appoint" on the one side of the balance, and all the several considerations to which I have adverted on the other. In my judgment the scale falls against the inference to be drawn from the use of the verb "appoint." I have been much, and properly, pressed by the decision of my brother Farwell in *In re Mayhew*. (1) It is very similar, I agree, in some material respects. There also the testatrix had no other power of appointment, and there also there was a trust for conversion and a direction for payment of debts. But there were not there the cumulative indications of intention upon which I rest my judgment in this case. There are indications here which in my judgment forbid my inserting here the words which Farwell J. inserted there, viz. "in exercise of every power enabling me in this behalf I appoint." In *In re Cotton* (2), even in a will which contained words to that effect, North J. nevertheless, upon indications similar to those upon which I rely, held that the power was not exercised. In my judgment this will did not exercise the special power.

Solicitor for the plaintiffs and for the defendants other than P. G. Weston and R. A. Weston: *Harry Watkins*.

Solicitors for the defendants P. G. Weston and R. A. Weston: *Colyer & Colyer*.

(1) [1901] 1 Ch. 677.

(2) 40 Ch. D. 41.



*In re* CARDIFF WORKMEN'S COTTAGE COMPANY,  
LIMITED.

BUCKLEY  
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*Practice—Company—Debentures—Registration—Extension of Time—Protection of unsecured Creditors—Companies Act, 1900 (63 & 64 Vict. c. 48), ss. 14, 15.*

Aug. 3, 10.

In making an order under s. 15 of the Companies Act, 1900, granting an extension of time for the registration of debentures, the Court will not necessarily impose any terms for the protection of unsecured creditors of the company.

MOTION by a company for an extension of the time for registering debentures.

In February, 1905, debentures were issued by the company expressed to be charged on all the property of the company and to rank *pari passu* amongst themselves. By inadvertence only one of these debentures was registered. There was evidence that the company was in a sound financial condition, that no creditor was suing or threatening to sue the company, and that no other debentures had been issued.

*A. Adams*, for the motion. We ask for an order in the form which was settled in *In re I. C. Johnson & Co.* (1) That order has always been followed, although in the most recent case on the subject, *In re Ehrmann Brothers, Ltd.* (2), it was explained that unsecured creditors are not protected thereby.

[BUCKLEY J. I must consider whether the form ought not to be varied so that they may be protected. If the time for registration is not extended these debentures will be absolutely void as against unsecured creditors; ought not some terms to be imposed? It has never been held that they ought not to be protected.]

But for s. 14, sub-s. 1, of the Companies Act, 1900, unsecured creditors would be postponed to unregistered debentures. The creditors must be taken to have known that the Court had power under the same Act to extend the time for registration

(1) [1902] 2 Ch. 101.

1906 (since noted [1906] W. N. 169,

(2) Times newspaper, July 27, and reported, *post* p. 697).

BUCKLEY J. and thus give an unregistered debenture priority. There is no injustice in not giving them any further protection.

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*Cur. adv. vult.*

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WORKMEN'S  
COTTAGE  
COMPANY,  
LIMITED.  
*In re.*

Aug. 10. BUCKLEY J. This is an application under s. 15 of the Companies Act, 1900, to extend the time for registration of certain debentures. The recent decision of the Court of Appeal in *In re Ehrmann Brothers, Ltd.* (1) renders it necessary to determine a point which is new as matter of decision, although I am not without assistance by way of dictum. In *In re Joplin Brewery Co.* (2) I thought it right that orders under this section should contain words expressing the order to be without prejudice to the rights of parties acquired prior to the time when the debentures are actually registered. In *In re I. C. Johnson & Co.* (3) the Court of Appeal had to consider and determine what words of qualification it was necessary to add for the purpose of giving effect to contractual rights contained in debentures which, under the terms of issue, were all to rank *pari passu*. They adopted the words "rights acquired," which I had used in *In re Joplin Brewery Co.* (2), and qualified them by words so expressed as to give effect to the contractual right in the debentures to rank *pari passu inter se*. In *In re Ehrmann Brothers, Ltd.* (1) the question for decision was what were the "rights" which under that form of words were protected and preserved. It was held that they were only rights acquired against property; that the words did not protect unsecured creditors who had obtained no charge upon property. In *In re I. C. Johnson & Co.* (3) the Master of the Rolls had said that "it is not necessary for us in this case to decide whether any creditor who had not actually issued execution is a creditor who ought to be protected and who ought to displace the rights of those who were not registered until after his debt had accrued." And, later, that "it is not necessary for the Court to decide any point about creditors, whether execution creditors or others." The Court, therefore, left open for future decision the question whether unsecured creditors ought to be protected. I have now to decide

(1) [1906] W. N. 169 (since reported, *post*, p. 697),

(2) [1902] 1 Ch. 79.

(3) [1902] 2 Ch. 108, 109,

that point. In *In re Ehrmann Brothers, Ltd.* (1) the question argued and decided was not what were the proper terms to impose, but what was the legal effect of the terms which had been imposed. The Court there decided that the words in *In re Joplin Brewery Co.* (2) and in *In re I. C. Johnson & Co.* (3) do not protect unsecured creditors. In these circumstances I have to consider whether they ought to be protected—whether I ought to insert words such as the following: “Provided always that the security conferred by the debentures for whose registration the time is extended shall not, as against any creditor of the company who shall have become a creditor after the date when those debentures ought to have been registered, and before the time when they shall be actually registered, be of any greater validity than if this order had not been made.” Neither in *Crew v. Cummings* (4), nor in *In re I. C. Johnson & Co.* (3), nor in *In re Ehrmann Brothers, Ltd.* (1) did this question arise for decision. By way of dictum, however, I think there are indications that serve as some guide. Looking at the matter upon principle, I have to see, in the language of s. 15, what terms and conditions seem to me “just and expedient” as terms to be imposed in an order extending the time for registration. The debentures in the present case were issued in February, 1905. Let me assume that persons became creditors of the company subsequent to that date whose debts are still unpaid. If before giving credit they had looked at the register kept under s. 14, they would not have found these debentures there. They may have given credit on the faith that they did not exist. At the present moment the holders of these unregistered debentures have as against these creditors no security. The statute makes the security void as against them. The purpose of the Act of Parliament in requiring within twenty-one days registration of securities on the company’s property is to ensure the means of notice to those who contemplate giving credit to the company. These creditors of date subsequent to February, 1905, are entitled to say that they gave credit upon the footing that these debentures did not exist,

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(1) [1906] W. N. 169 (since reported, *post*, p. 697).

(2) [1902] 1 Ch. 79.

(3) [1902] 2 Ch. 101.

(4) (1888) 21 Q. B. D. 420.

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inasmuch as they were not registered; that the statute makes the debentures void as against them; and, if they were here (which unfortunately they are not), they might argue that justice requires that the status quo should, so far as they are concerned, be maintained. Upon the first consideration of the matter this might seem right, but the answer to it, I think, is as follows: If the company now cancelled these unregistered debentures they could issue to their late holders new debentures and register them within twenty-one days, and those debentures would be valid subject to attack (if attack could successfully be made upon them) upon the ground of fraudulent preference. The person who is at any moment the unsecured creditor of the company is always exposed to the danger that the company may execute in favour of other creditors incumbrances upon its property, and unless he can attack those securities on the ground of fraudulent preference they prevail as against him. So long as the company is a going concern the creditor who has obtained no charge upon property necessarily runs the risk of dispositions made by the company by sale, mortgage, or otherwise. I am conscious that this view renders the section of the Act of 1900 which requires registration of incumbrances of much less value. I incline to the opinion that when a case of sufficient magnitude arises it may be well to give notice to some of the unsecured creditors of substantial amount so as to give them an opportunity of being heard, if they so desire, upon the question of what is "just and expedient" in their interest. I can anticipate a contention that it might be just (say) to require the order to be advertised and its operation suspended for a certain time in order to enable unsecured creditors to come in and ask for payment or security before validity is given to the void debentures, or to ask for terms similar to those found in s. 1, sub-s. 2 (b), of the Companies (Memorandum of Association) Act, 1890. And I can foresee a possible answer to that contention. Looking at the affidavit in the present case, I do not think it necessary to take that course in the present instance. In the circumstances of this case I think I may, without inserting for the protection of the unsecured creditors any words such as above suggested, make the order upon the terms imposed in



*In re I. C. Johnson & Co.* (1), notwithstanding the fact that it has been decided that that form of order does not protect the unsecured creditors. I make the order accordingly.

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Solicitors: *Radcliffe, Cator & Hood, for Shirley & Sons, Cardiff.*

H. C. R.

SOUTH OF ENGLAND DAIRIES, LIMITED *v.* BAKER. JOYCE J.

[1905 S. 3760.]

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March 16, 17;  
April 2, 3.

*Landlord and Tenant—Covenant by Landlord to pay Rates—Covenant with Lessee "his executors, administrators and assigns"—Underlease—Merger of Reversions—Benefit of Covenant—Privity of Contract—Right in Equity—Underlessee not an "Assign"—No right of Action.*

An underlessee is not entitled to sue the assign of the freehold and leasehold reversions in the premises comprised in his underlease in respect of a positive covenant by the ground landlord with the original lessee, where the latter has not assigned or demised the benefit of such covenant to, or entered into a similar covenant with, the underlessee.

On the demise of part of a freehold house the lessee covenanted to pay one-third of the water rate payable in respect of the house, and the lessor covenanted to pay all rates and taxes except the water rate to the extent covenanted to be paid by the lessee. The lessee subdemised to the plaintiffs, who, with knowledge of the superior lease, covenanted to pay one-third of the water rate payable in respect of the house. Subsequently the freehold reversion and the superior lease became vested in the defendant, who, the local authority having separately assessed the part comprised in the lease and underlease, refused to pay any of the rates and taxes in respect of such part. The local authority distrained, and the plaintiffs sought to recover from the defendant the amount which they had been compelled to pay:—

*Held*, that the action must fail, there being no privity between the parties or any principle of equity upon which the plaintiffs were entitled to succeed.

An underlessee is not an "assign" of his lessor (the original lessee) so as to be entitled to the benefit of a positive covenant entered into with the latter, "his executors, administrators and assigns," by the ground landlord in the original lease.

#### WITNESS ACTION.

By an indenture of lease dated July 20, 1896 (hereinafter called "the superior lease"), E. J. Walker, the owner in fee simple of

JOYCE J. No. 40, Church Road, Hove (in the lease referred to as "the  
1906 lessor"), demised the shop and ground floor of No. 40 unto  
SOUTH OF J. H. Marks (therein called "the lessee") for the term of twenty-  
ENGLAND one years from June 24, 1896, at the yearly rent of 50*l.*; and  
DAIRIES, the lessee thereby covenanted with the lessor (inter alia) to pay  
LIMITED the said rent, and also to pay one-third of the water rate for the  
v. time being payable in respect of No. 40, Church Road. The  
BAKER. lease contained the usual covenant on the part of the lessor for  
quiet enjoyment, and also a covenant that he would "pay and  
discharge all rates taxes assessments and outgoings whatsoever  
which now are or during the said term shall be imposed or  
assessed upon the said premises or the landlord or tenant in  
respect thereof by authority of Parliament or otherwise (other  
than the water rate to the extent hereinbefore covenanted to be  
paid by the lessee)"; and it was thereby declared that, where the  
context allowed, the expressions "the lessor" and "the lessee"  
should include respectively besides the said J. E. Walker, his  
heirs and assigns, and besides the said J. H. Marks, his executors,  
administrators and assigns.

At the date of the superior lease the rates and taxes of the  
entirety of the premises No. 40, Church Road were included in  
one assessment.

Marks carried on the business of a dairyman upon the premises  
comprised in his lease, and in 1897 the plaintiff company was  
formed by him and others for the purpose of acquiring that and  
other similar businesses.

By an indenture of underlease dated October 28, 1897  
(hereinafter called "the underlease"), J. H. Marks ("the lessor")  
"demised" to the plaintiffs ("the company") "All that the  
shop and ground floor of all that messuage known as No. 40  
Church Road Hove Sussex. . . . All which premises are held  
by the lessor under a lease dated the 20th day of July 1896  
and made between Edward John Walker of the one part  
and the lessor of the other part" for the term of twenty  
years, less the last three days, from June 24, 1897, at the  
yearly rent of 56*l.* 10*s.*, and the company thereby covenanted  
with the lessor (inter alia) to pay the said rent and also to pay  
one-third of the water rate for the time being payable in respect

of No. 40, Church Road, and to observe and perform the covenants in the superior lease above mentioned (other than the covenant for payment of rent). The underlease contained the usual covenant on the part of the lessor for quiet enjoyment, and a covenant during the said term to pay the rent reserved by the superior lease, and an acknowledgment by the lessor of the company's right to production and delivery of copies of the superior lease, and also a declaration that, where the context allowed, the expressions "the lessor" and "the company" should include respectively besides the said J. H. Marks, his executors, administrators and assigns, and besides the company, its successors and assigns.

Some years after the execution of the underlease the method of assessing No. 40, Church Road was altered, the ground floor demised and the other portions of the house being respectively assessed separately for the purposes of poor, water, and other rates and taxes.

By an indenture of conveyance dated November 18, 1904, E. J. Walker conveyed No. 40, Church Road to the defendant Baker in fee simple, subject to the superior lease.

By an indenture of assignment dated February 2, 1905, indorsed on the superior lease, J. H. Marks, in consideration of the sum of 45*l.*, assigned to the defendant Baker all the premises demised by the superior lease, to hold the same thenceforth for the residue of the term of twenty-one years granted by the superior lease at the rent thereby reserved, and subject to the covenants by the lessee and conditions therein contained and specified and thenceforth to be performed and observed, and subject also to and with the benefit of the underlease; and the defendant Baker thereby covenanted that he would thenceforth pay the rent reserved by and perform all the covenants by the lessee contained in the superior lease, and keep J. H. Marks indemnified against all claims and demands in respect thereof.

From the date of the superior lease until the month of February, 1905, E. J. Walker duly paid the whole of the rates and taxes payable in respect of No. 40, Church Road except one-third of the water rate, but after the execution of the indenture of February 2, 1905, the defendant refused to pay the rates and

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taxes payable in respect of the plaintiffs' premises, or to allow the plaintiffs to deduct the same from their rent. In consequence of this refusal the plaintiffs were compelled under pressure of a distress to pay the rates themselves, and they subsequently commenced this action for—(1.) a declaration that they were entitled as between themselves and the defendant to the occupation of the said ground floor premises free from any payment for rates or taxes except one-third of the water-rate, and to deduct from the rent payable under the underlease any sums they had been or might be compelled to pay for rates and taxes except as aforesaid; or (2.) in the alternative, a declaration of the respective rights and liabilities of the plaintiffs and defendant in the premises comprised in the underlease in respect of the rates and taxes payable in respect thereof; and (3.) damages for the breach by the defendant of his obligation to pay the said rates and taxes.

*Hughes, K.C.*, and *Chubb*, for the plaintiffs. The obligation or covenant to pay two-thirds of the water rate and the other rates runs with the land, and by virtue of 32 Hen. 8, c. 34, the burden goes to the assignee of the reversion and the benefit to the assignee of the lessee. The assignee, whether of a part of the property or of a part of the term, is an assignee within that statute: *Spencer's Case* (1), and *Kidwelly v. Brand* (2), which latter case was referred to with approval by Fry J. in *Taite v. Gosling* (3), where he held that in mutual covenants between owners in fee, "their heirs and assigns," the word "assigns" included the lessee of one of the owners, and entitled him to sue to restrain a breach of the covenant. That decision shews that "assigns" includes anyone who takes any part of the term or interest. The plaintiffs have taken an underlease of the property, and that amounts to an assignment pro tanto of the lease. It is immaterial that what the plaintiffs have is an underlease, for, according to Fry J.'s judgment in *Taite v. Gosling* (3), an underlessee is an assign and is in the same position. The plaintiffs, therefore, as assigns of the lease within the meaning

(1) (1582) 5 Rep. 16a; 1 Sm. L. C. (11th ed.) p. 55.

(2) (1551) Plowd. 69.

(3) (1879) 11 Ch. D. 273, 277.



of 32 Hen. 8, c. 34, s. 2, are entitled to the benefit of this covenant. They could have sued Walker, and can now sue his assignee.

Further, the premises which Marks demised to the plaintiffs by the underlease, and the only premises which were in the contemplation of the parties, were premises free of rates and taxes except in respect of one-third of the water rate, which the plaintiffs expressly covenanted to pay. Marks could have sued Walker on his covenant in the superior lease to pay the rates. Although a surrender may not prejudice a third party, it may benefit him: Co. Litt. 338b; and in this case the surrender ought not to operate against the plaintiffs. In the events which have happened the original lessor and lessee are now represented by one and the same person, the defendant Baker, and he cannot say "I will sue the underlessees for rent under the underlease without any regard to the obligations imposed upon me by the superior lease." When he bought he was only entitled to the rent after payment of rates and taxes. He cannot now, as Marks, sue without regard to the obligations of Walker. The contract was that the person entitled to the freehold reversion should pay the rates.

*Younger, K.C.*, and *Cavanagh (E. E. Humphrys with them)*, for the defendant. The benefit of the lessor's covenant in the superior lease was not demised or assigned by the underlease. There is no privity of contract between the plaintiffs and defendant: Co. Litt. 308a, s. 547, n. Before the grant of the underlease Marks could have released the lessor from liability to pay the rates and taxes, and, not having contracted by the terms of the underlease not to release these rights, he could have released them after granting the underlease. It is said that the plaintiffs, as assignees of Marks, can sue the defendant, and *Taite v. Gosling* (1) is relied upon in support of that proposition. But that was a case of freehold property, and on the principle of *Renals v. Cowlishaw* (2) it was held that a lessee could enforce restrictive covenants to the benefit of which his lessor was entitled. In his judgment Fry J. appears to except such a case.

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(1) 11 Ch. D. 273, 277.

(2) (1878) 9 Ch. D. 125; on appeal, (1879) 11 Ch. D. 866.

JOYCE J. as this, for he says: "It is true that underletting is not considered an assignment of a lease, so as to be a breach of a covenant not to assign, but that is because the verb 'assign' as applied to leasehold property has the technical meaning of assigning the whole interest." In *Bryant v. Hancock & Co., Ltd.* (1) it was held that the "assigns" of the lessee did not include an underlessee. That was the case of a covenant against jeopardizing a public-house licence, but if an underlessee is not an assign for one purpose he is not an assign for another purpose.

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[JOYCE J. In that case the Court was dealing with the burden of a covenant, whereas this is a case of the benefit of a covenant. I do not think that *Bryant v. Hancock & Co., Ltd.* (1) has any application to the present case, which involves the distinction between an underlessee and an assignee of the term.]

The only way in which the defendant, who is an assignee of the original lessor, can be sued is under 32 Hen. 8, c. 34, but underlessees are not within that statute. Sect. 9 of the Real Property Act, 1845, does not help the plaintiffs. That section only enables the plaintiffs to sue the defendant for what they could have sued Marks under the underlease. There is no privity whatever between the plaintiffs and the defendant, and they are not entitled to succeed. There was nothing demised to the plaintiffs but the actual property, which was described by reference to the parcels in the superior lease, and was not stated to be free from rates and taxes. Marks did not covenant to pay the rates and taxes.

*Hughes, K.C.*, in reply. The decision in *Taite v. Gosling* (2) is sound, and, so far as the benefit of a covenant is concerned, the term "assigns" includes anyone who takes any part of the term or interest.

[JOYCE J. Could the plaintiffs have compelled Marks to lend them his name in order to sue the original lessor upon his covenant?]

I submit that they could. The underlease expressly mentions the superior lease, under which the ground landlord was liable to pay the rates, and the property demised was described by

(1) [1898] 1 Q. B. 716; on appeal, [1899] A. C. 442.

(2) 11 Ch. D. 273, 277.

reference to the superior lease. That was in reality a demise of the property free from rates other than one-third of the water rate. That was all that Marks demised, and, having parted with his reversion to the defendant, the plaintiffs are entitled to stand in his shoes and recover the rest of the rates from the defendant. The plaintiffs have a plain equity in their favour. I ask the Court to apply a principle analogous to the principle applied in *Moule v. Garrett*. (1)

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JOYCE J., after stating the facts and referring to the lessor's covenant in the superior lease, continued:—That is said to be, in effect, a covenant by the lessor for himself, his heirs and assigns, with the lessee, his executors, administrators and assigns. The words in the Conveyancing and Law of Property Act, 1881, do not exactly fit this covenant so as to make it a covenant by the lessor for himself and his assigns, but probably that is immaterial. By the definition clause in the superior lease it is declared that, where the context allows, the expressions “the lessor” and “the lessee” shall include respectively besides the said J. E. Walker, his heirs and assigns, and besides the said J. H. Marks, his executors, administrators and assigns. I do not know that that makes the lessor covenant in terms for himself, his heirs and assigns; it is a covenant by the lessor his heirs and assigns. I do not, however, attach any importance to this difference, and I will treat it as a covenant by the lessor, for himself, his heirs and assigns, on the one side, with the lessee, his executors, administrators and assigns on the other.

On October 28, 1897, Marks granted to the plaintiffs an underlease of the same part of the premises, No. 40, Church Road, as was comprised in the superior lease, and the plaintiffs covenanted to pay one-third of the water rate payable in respect of the whole house. Nothing further was said as to the water rate, or as to rates imposed upon the premises by the local authority of Hove.

After the underlease was granted, what was the position between the parties with respect to the positive covenants in the superior lease, and, particularly, with respect to the

(1) (1870) L. R. 5 Ex. 132; (1872) L. R. 7 Ex. 101.

JOYCE J. positive covenant by the lessor to pay two-thirds of the water  
 1906 rate, and the other rates imposed? It is really elementary  
 SOUTH OF that, as between the superior landlord and the plaintiffs who  
 ENGLAND were underlessees, there was neither privity of contract nor  
 DAIRIES, privity of estate. The law is plainly stated in Platt on  
 LIMITED Leases, vol. i., 1847 ed. p. 102: "But as no privity exists  
 v. between the underlessee and the original lessor, the covenants  
 BAKER. entered into between the latter and the original lessee, though  
 — they be covenants which run with the land, as to pay rent, to  
 repair, &c., cannot affect, either by way of right or liability, the  
 underlessee personally," the reason being that an underlessee  
 is not an assignee within the statute 32 Hen. 8, c. 34, s. 2.  
 We all know that this is the reason why a mortgage of a lease is  
 usually made by way of underlease in order that the mortgagee  
 may not become liable to perform the lessee's covenants. An  
 assignment of a term differs from an underlease in that the  
 former means parting with the whole and the latter with only  
 a portion of the lessee's interest. An assignment of a lease  
 must necessarily embrace all the estate of the assignor: Preston  
 on Conveyancing, 3rd ed. vol. ii. p. 124.

As I understand, the law stands in this way. The original  
 lessor has no right of action against the underlessee personally  
 for breach of any positive covenant of the lessee's contained in  
 the original lease. The original lessor's remedy in such a case  
 is against the original lessee, who is liable for breach of the  
 covenant. The underlessee is liable, however, in equity to be  
 restrained from breach of a negative or restrictive covenant  
 contained in the original lease of which he had notice, express  
 or imputed, when the underlease was granted. What I have  
 said refers only to the liability under the covenants, but it is  
 clear that the same principle applies to the benefit. As stated  
 in some of the cases, and particularly in *Palmer v. Edwards* (1),  
 reported in a note to *Holford v. Hatch* (2), the remedies and the  
 rights are mutual.

I do not find anything in this underlease which, either at  
 law or in equity, entitles the plaintiffs to compel their immediate  
 lessor to sue the ground landlord on the covenants in the lease,

(1) (1783) 1 Doug. 187, n.

(2) (1779) 1 Doug. 183.



or to lend his name for the purpose. If there had been something of that sort in the underlease, then I might have had to come to a different conclusion in this case.

What happened in point of fact was this, that on November 18, 1904, Baker, the present defendant, purchased the freehold reversion upon the superior lease, and on February 2, 1905, he also purchased the superior lease itself, and so became the immediate reversioner on the underlease as well as being ground landlord. The local authority, having assessed all the premises together before, began to assess the several parts separately, and there was a separate assessment on the ground floor of No. 40, Church Road, the portion of the premises comprised in both the superior lease and the underlease. Then the plaintiffs commenced this action to compel the defendant, the ground landlord, to pay, as everyone had supposed he would do, two-thirds of the water rate upon the whole, and the other rates for which there is a separate assessment on the premises comprised in the lease and underlease.

I am clearly of opinion that the plaintiffs have no case in law, for the reason that they would not have had any such case against either Walker or Marks if Baker had not purchased the reversion and the lease; and the only question is whether they have any remedy on some principle of equity entitling them to succeed.

After considering the matter, I come to the conclusion that it has not been made out that there is any such principle of equity, or that anything has happened which entitles the plaintiffs in equity to compel the present defendant, who represents both the original lessee and the ground landlord, to sue himself for breach of the performance of the lessor's covenants in the superior lease, or to compel the ground landlord to perform such covenant. I have not the slightest doubt that is what all parties contemplated would be the result, but under the circumstances I do not see any way to decide in favour of the plaintiffs. Therefore this action fails, but I give no costs.

Solicitors: *Palmer & Bull, for Upperton & Bacon, Brighton; Indermaur & Brown, for Cardens, Brighton.*

R. M.

JOYCE J.

1906

—  
SOUTH OF  
ENGLAND  
DAIRIES,  
LIMITED  
v.  
BAKER.

SWINFEN  
EADY J.

*In re* LEHMANN AND WALKER'S CONTRACT.

1906

[1906 L. 1315.]

July 27.

*Vendor and Purchaser—Sale of Land—Custody of Title Deeds—Retention of Part of Estate by Vendor—Extinguished Easement—Retention of Servient Tenement—Deeds shewing Title to Easement and to Extinguishment—Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, r. 5.*

Documents of title shewing the title to, and the extinguishment of, an easement formerly appurtenant to the land sold, over a servient tenement retained by the vendor, relate to the servient tenement, and the vendor has a right to retain them under s. 2 of the Vendor and Purchaser Act, 1874.

THIS summons was taken out under the Vendor and Purchaser Act, 1874, by the purchaser of a house called Bedford Lodge, at Bourne End, Buckinghamshire, for a declaration that he was entitled to have delivered to him three deeds which the vendor claimed to retain. The contract was an open one.

The deeds in question were the conveyance from F. J. Green to the vendor dated December 2, 1904; a conveyance to F. J. Green by the trustees of the will of J. R. Collett dated July 6, 1882, and a conveyance from John Camden to J. R. Collett dated March 17, 1876.

All these conveyances contained a grant, together with and as appurtenant to Bedford Lodge, of a general right of way in common with others over a private road which bounded the property on the north, and a right of footway from the end of the said private road by a footpath to the river Thames, for certain limited purposes, over a piece of land coloured green on the plan drawn on the deed of 1904. This piece of land coloured green was at the date of this conveyance the property of the vendor. He had bought Bedford Lodge for the purpose of extinguishing the right of footway, and was selling Bedford Lodge without any such right of way. It was admitted that the right of way over the private road was sold to the purchaser. **V**He contended, and for the purposes of this argument the

purchaser admitted, that the right of footway over the land coloured green had been extinguished by unity of possession. SWINFEN EADY J.

The vendor claimed to retain the deeds as relating to the land coloured green.

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CONTRACT,  
*In re.*

*T. L. Wilkinson*, for the purchaser. The vendor claims to retain the deeds as in some way being title deeds of the servient tenement. But he does not retain any property to which these deeds relate. They relate only to Bedford Lodge and the easement. He does not retain the easement, because it has ceased to exist. The authorities are clear that an easement cannot exist in gross. There is no authority directly in point, but *In re Williams and the Duchess of Newcastle's Contract* (1) shews that the vendor must retain an interest in land.

*Gurdon*, for the vendor. The vendor is entitled to retain these deeds, not because he retains the easement, but because they form part of his title to an unincumbered estate in the land coloured green. If the easement had been released by a separate deed there would be no question about its relating to the land retained. Deeds relating to an easement over the land clearly relate to the land.

*T. L. Wilkinson*, in reply.

SWINFEN EADY J. I am of opinion that the vendor is entitled to retain these deeds. The facts are these: The vendor owned an estate which was coloured on the plan partly green and partly yellow. Over the part coloured green there was a right of way the owner of which was entitled to it as appurtenant to, and by virtue of his ownership of, the land coloured pink on the plan on which the house called Bedford Lodge stands. The vendor bought the pink land for the purpose of extinguishing the right of way, and having, as it is admitted, extinguished it, is now selling the pink land without any right of way. The vendor retains the land coloured green, and claims to retain the conveyance of Bedford Lodge and the other title deeds relating to the easement on the ground that the conveyance of Bedford Lodge to him operated as a release of the right of way, and

(1) [1897] 2 Ch. 144.

SWINFEN EADY J. therefore all the deeds shewing the title to the right of way relate to the land coloured green.

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AND  
WALKER'S  
CONTRACT,  
*In re.*

The deeds do relate to the land coloured green, and do not relate to it any the less because they relate to an easement over it. If there were a deed simply releasing the easement instead of a deed which operated as an extinguishment, it would clearly relate to the land. The vendor does therefore, in my opinion, retain part of the land to which these title deeds relate, because they shew the extinguishment of the easement. The vendor is therefore entitled to retain the deeds. There will be a declaration to that effect, and the purchaser must pay the costs of the summons.

Solicitors: *Atkinson & Dresser; Frere, Cholmeley & Co.*

J. R. B.

SWINFEN EADY J. *In re* HUGHES AND THE LONDON AND NORTH WESTERN RAILWAY ACT, 1865.

1906

*July 28.*

*Disentailing Assurance—Protector of Settlement—Legal Estate in Trustees—Void Trust for Accumulation—Beneficial Owner—Heir-at-Law—Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74)—Accumulations Act, 1800 (Theellusson Act) (39 & 40 Geo. 3, c. 98), s. 1.*

A testator who died on April 3, 1854, devised real estate to trustees during the lives of three persons and the survivor of them upon trust to pay certain annuities and accumulate the surplus rents and profits and hold them upon the trusts therein mentioned during the lives aforesaid. And from and after the termination of the estate limited to the trustees, the testator devised the same to his grandson, John Hughes, in tail. On July 14, 1875, John Hughes executed a disentailing deed in which the only survivor of the trustees joined as protector of the settlement.

By an order of the Court dated March 26, 1879, it was declared that the trust for accumulation contained in the testator's will was void as from April 3, 1875, the expiration of twenty-one years from his death, and from that date the surplus rents belonged to his heir-at-law, the father of John Hughes:—

*Held*, that at the date of the disentailing deed there was no protector of the settlement. The trustee was not protector, for he had no beneficial interest. The beneficial interest created by the will had come to an end, and the heir-at-law, who was entitled to the beneficial interest, did not take under the settlement made by the will, and was also



prevented from being protector by s. 27 of the Fines and Recoveries Act, which forbids an heir to be a protector. The disentailing deed was therefore valid.

SWINFEN  
EADY J.

1906

HUGHES,  
*In re.*

THIS was a petition for the payment out of Court of a sum of 1228*l.* 6*s.* 1*d.* Consols, the balance remaining of the purchase-money paid into Court by the London and North Western Railway in 1867 for land purchased from the trustees of the will of John Hughes.

John Hughes died on April 3, 1854, having by his will dated January 1, 1854, devised all his real estate unto and to the use of John Lloyd Morris, Joseph Lloyd Morris, and Thomas Lloyd Morris, their heirs and assigns, for and during the natural lives of his son Richard Robert Hughes and Catherine, his son's wife, and his daughter Mary Elizabeth Fishwick and the life of the survivors of them upon trust to receive the rents and profits, and thereout and out of his personal estate to pay his debts and invest the surplus, and out of the said rents and profits and the income of the investments to pay an annuity of 150*l.* to his said son during his life, and after his son's death to pay a like annuity to his son's wife during her life, and to pay a like annuity to his daughter during her life, and to accumulate the residue of the rents and profits during the lives of his said son, son's wife, and daughter, and the life of the survivor, and on the death of the survivor to stand possessed of the accumulations in trust for all his grandchildren, children of his said son and daughter, in equal shares. And from and after the termination of the estate thereby limited to the said trustees he devised his said real estates unto and to the use of his grandson John Hughes, the eldest son of his son Richard Robert Hughes, in tail, and in default of his issue to the use of his four grandsons, younger sons of the said Richard Robert Hughes, as tenants in common in tail, with remainders over.

Joseph Lloyd Morris died on November 19, 1863. On December 21, 1867, a piece of the land devised by the will was taken by the London and North Western Railway Company and conveyed to them by the surviving trustees under the powers of the Lands Clauses Consolidation Act, and the purchase-money was paid into Court.

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John Lloyd Morris died on December 11, 1872. On July 14, 1875, John Hughes, the testator's grandson, duly executed a disentailing deed of the lands and the said purchase-money with the consent of Thomas Lloyd Morris, who was then the sole surviving trustee, as protector of the settlement.

By an order of the Court, dated March 26, 1879, and made in an action for executing the trusts of the testator's will, it was declared that the trust for accumulation of the residue of the rents and profits was void as from April 3, 1875, when twenty-one years from the date of the death of the testator had expired, and that as from that date the rents and profits belonged, subject to the payment of the annuities, to Richard Robert Hughes, the testator's heir-at-law.

This petition was presented by the devisee of the lands and purchase-money under the will of John Hughes, the first tenant in tail. The only question which arose on the petition was whether, at the date of the disentailing deed, July 14, 1875, being after the expiration of the twenty-one years during which the accumulations were valid, the said Thomas Lloyd Morris, the surviving trustee under the testator's will, was the protector of the settlement thereby created, or who was such protector.(1)

(1) The argument turned on ss. 22 and 27 of the Fines and Recoveries Act, 3 & 4 Will. 4, c. 74.

Sect. 22. "That if at the time when there shall be a tenant in tail of lands under a settlement there shall be subsisting in the same lands or any of them, under the same settlement, any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years), prior to the estate tail, then the person who shall be the owner of the prior estate, or the first of such prior estates if more than one, then subsisting under the same settlement, or who would have been so if no absolute disposition thereof had been made, (the first of such prior estates, if more than one, being for all the purposes of this Act

deemed the prior estate) shall be the protector of the settlement as far as regards the lands in which such prior estate shall be subsisting, and shall for all the purposes of this Act be deemed the owner of such prior estate, although the same may have been charged or incumbered either by the owner thereof or by the settlor, or otherwise howsoever, and although the whole of the rents and profits be exhausted or required for the payment of the charges and incumbrances on such prior estate, and although such prior estate may have been absolutely disposed of by the owner thereof, or by or in consequence of the bankruptcy or insolvency of such owner, or by any other act or default of such owner; and that an estate by the curtesy, in respect of

*Luxmoore* for the petition. At the date of the disentailing deed there was no prior estate in existence under the same settlement. Richard Robert Hughes was the person for the time being entitled beneficially to the rents and profits, but he was not entitled under the same settlement. In *Vine v. Raleigh* (1) it was held that persons entitled to receive rents, when a direction to accumulate contained in a settlement had become void under the Thellusson Act, were entitled, not under the settlement, but under the compound settlement created by the deed of settlement and the Act. The same reasoning applies here, and Richard Robert Hughes took under the compound settlement made by the will and the Act. But even if he had taken under the same settlement he took as heir, and heirs are forbidden to be protectors by s. 27. Either there was no protector or the surviving trustee was protector, and in either case the disentailing deed is good.

*Methold* and *H. S. Preston*, for a mortgagee of the petition. The first trust of the estate for the three lives is to pay debts, and it has been held that a trustee to pay debts is a protector. But a better solution is that there was no protector at all. The substantial owner is the protector: *In re Dudson's Contract* (2); *In re Ainslie*. (3) While the accumulations went on it might be reasonable to say the trustee was protector, but when they were stopped he became a bare trustee: the substantial owner was the heir-at-law; he does not take under the settlement, and is prevented from being protector by s. 27.

*Sheldon*, for the trustees of John Hughes' will.

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1906

HUGHES,  
*In re.*

the estate tail, or of any prior estate created by the same settlement, shall be deemed a prior estate under the same settlement within the meaning of this clause; and that an estate by way of resulting use or trust to or for the settlor shall be deemed an estate under the same settlement within the meaning of this clause."

Sect. 27. "Provided always, that no woman in respect of her dower, and (except in the case hereinafter provided for of a bare trustee under a

settlement made on or before the thirty-first day of December, one thousand eight hundred and thirty-three) no bare trustee, heir, executor, administrator or assign, in respect of any estate taken by him as such bare trustee, heir, executor, administrator or assign, shall be the protector of a settlement."

(1) [1896] 1 Ch. 37.

(2) (1878) 8 Ch. D. 628.

(3) (1884) 54 L. J. (Ch.) 8; 51 L. T. 780.

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EADY J.

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HUGHES,  
*In re.*

*Wace*, for E. P. Hughes, a person entitled in remainder after the estate tail given to John Hughes. If the Thellusson Act made a disposition of the rents and profits for the period after the accumulations were stopped then the persons entitled to the accumulations "would have been the owners of a prior estate under the settlement if no absolute disposition thereof had been made," for such an absolute disposition was made by the Act. If, on the other hand, the Thellusson Act merely stopped the accumulations and did not dispose of the rents, there was a resulting trust in favour of the settlor, and his heir-at-law claims under that resulting trust, and so under the settlement. Sect. 27 of the Act is a mere corollary of s. 22, and "heir" there means heir of the owner of the prior estate. The reasoning of Lord St. Leonards in Sugden on the Real Property Statutes, 2nd ed. pp. 216, 217, dealing with s. 28, shews that that is so. *Vine v. Raleigh* (1) was a question on the construction of the Settled Land Act, 1882; it cannot affect this case.

*Scott Thompson*, for the London and North Western Railway Company.

SWINFEN EADY J. The position at the date of the disentailing deed, July 14, 1875, was this. The surviving trustee had the legal estate during the lives of three persons and the survivor of them; subject thereto John Hughes was tenant in tail. There was no valid trust of the rents the trustee was to receive during his estate. The valid trusts had come to an end. The beneficial interests given by the will, after April 3, 1875, had been avoided by the Thellusson Act, which directs (in s. 1) that "the rents, issues, profits and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto, if such accumulations had not been directed," that is to say, shall go to and be divided among the persons entitled thereto according to law. In this case the income, being rents of real estate, devolved upon the heir-at-law, because he was the person to whom the law gave them in default of any valid disposition

(1) [1896] 1 Ch. 37.



thereof by the will. It is said that the heir-at-law took an estate by way of resulting use or trust within the concluding words of s. 22 of the Fines and Recoveries Act, and therefore he was protector of the settlement by virtue of that section. The answer to that contention is twofold. In the first place, there was no resulting trust or use to the settlor under the settlement created by the will. The rents were undisposed of by the will and devolved upon the heir-at-law; and, secondly, s. 27 of the Fines and Recoveries Act provides that no heir, "in respect of any estate taken by him as such heir, shall be the protector of a settlement." Reading ss. 22 and 27 together, it is plain that Richard Robert Hughes does not take under the limitations of the will, and is not within the settlement thereby created. It follows that there was no protector of the settlement at the date of the disentailing deed, and that that deed is valid.

The other point taken by Mr. Wace seems to me wholly untenable. He wishes to treat the class of grandchildren who would have been entitled to the accumulations of rents and profits, if such accumulation had been valid, as owners of a prior estate under the settlement; which estate had been absolutely disposed of by the Thellusson Act—that is, he wishes to treat the Thellusson Act as an absolute disposition under s. 22. The Thellusson Act did not dispose of these interests; it merely declared them invalid.

The costs of E. P. Hughes must be paid out of the fund in Court, and not by the railway company, otherwise the order will be according to the prayer of the petition.

Solicitors: *Busk, Mellor & Norris, for Lloyd & Roberts, Ruthin; Stow, Preston & Lyttelton, for Parry Jones & Francis, Denbigh; Patersons, Snow, Bloxam & Kinder, for James & Humphreys, Llanrwst; C. de J. Andrewes.*

SWINFEN  
EADY J.

1906

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*In re.*

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1906

Aug. 3, 9.

*In re* ROBBINS.  
ROBBINS v. LEGGE.

[1906 R. 1002.]

*Annuity — Direction to purchase Annuity of specified Amount — Death of Annuitant before Probate—Right to Value of Annuity.*

R. by will directed his trustees, out of the proceeds of sale and conversion of his estate, after payment of his debts, funeral and testamentary expenses, to purchase in the name of his wife a Government annuity of 400*l.* for her life. The wife survived the testator, but died within sixteen days before the will was proved or any debts paid:—

*Held*, that the annuity, and the right to take its value in cash instead of the annual payment, vested in the widow on the testator's death, and therefore her legal personal representatives were entitled to the sum which at the date of the testator's death would have purchased the annuity.

HENRY JOHN ROBBINS by his will dated February 7, 1900, after certain specific devises and bequests, gave all his residuary estate to trustees upon trust for sale and conversion and to stand possessed of the proceeds "upon trust after payment thereof of all expenses attending such sale and conversion and my debts funeral and testamentary expenses to purchase in the name of my wife Jemima Charlotte Robbins a Government annuity of the clear annual value of 400*l.* for the life of my said wife Jemima Charlotte Robbins," and upon further trust to pay certain pecuniary legacies and pay the residue to his son Colonel Robbins.

The testator died on October 11, 1905, and his will was proved on November 25, 1905.

His wife survived him, but died on October 27, 1905, before the will was proved. She had not made any election to take the value of the annuity in cash.

Administration to her estate had been taken out in June, 1906, by two of her next of kin.

The administrators claimed that they were entitled to the sum which would at the testator's death have purchased the annuity.

This summons was taken out by the testator's residuary legatee for a declaration whether the legal personal representatives of Jemima Charlotte Robbins, the testator's wife, were entitled to be paid any sum or sums in respect of the annuity directed to be purchased by the will.

SWINFEN  
EADY J.

1906

ROBBINS,  
*In re.*

ROBBINS

*v.*

LEGGE.

*Eve, K.C.*, and *Vaughan Hawkins*, for the summons. The claim to any sum here depends on the annuitant's right of election: but that is merely the right of an annuitant who is *sui juris* to stop the special trust and take the money; it does not operate against the rest of the estate so as to give him more than he would otherwise have had, or get rid of the conditions attached to the gift. In these cases the condition is that the annuitant shall survive the time at which the annuity would be purchased. There is a slip in *Theobald on Wills*, 6th ed. p. 484, where he says: "So if there is a direction to purchase a Government annuity of a given amount, the annuitant is entitled to the purchase money, though he may die before the time when the annuity was to be purchased." The last words are wrong. The Government have no power to grant retrospective annuities. The Government Annuities Act, 1829 (10 Geo. 4, c. 24), s. 1, only enables them to grant annuities on existing lives. In *Dawson v. Hearn* (1) Leach M.R. was dealing with a case in which the annuitant in fact survived the time appointed for purchase. The argument in that case that *Palmer v. Craufurd* (2) and *Bayley v. Bishop* (3) cover the case is not correct. In both those cases a specific sum was given to be laid out in the purchase of an annuity that was equivalent to a legacy of the specific sum: see *Yates v. Compton*. (4) In *In re Mabbett* (5) it was held that the legal personal representatives of an annuitant who died after the annuity could have been purchased were, and those of an annuitant who died before that time were not, entitled to take the capital value.

*Micklem, K.C.*, and *A. Roscoe*, for the legal personal representatives of Mrs. Robbins. The annuitant takes a vested interest at the testator's death, and it makes no

(1) (1831) 1 Russ. & My. 606, 609.

(3) (1803) 9 Ves. 6.

(2) (1819) 3 Swans. 482.

(4) (1725) 2 P. Wms. 308.

(5) [1891] 1 Ch. 707.

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—

difference whether the annuity can be purchased at once or whether the testator gives a specified sum to be laid out in the purchase of an annuity, or directs the purchase of an annuity of a specified amount: *Dawson v. Hearn*. (1) The passage in Theobald is perfectly correct, and is supported by the statements of the law in Jarman on Wills, 5th ed. p. 561, n., and in Hayes and Jarman's Concise Forms of Wills, 12th ed. p. 165, and by the form given in Bythewood and Jarman, 3rd ed. vol. xi. p. 466. *Barnes v. Rowley* (2), *Bayley v. Bishop* (3), and *Day v. Day* (4) are clear authorities that the annuity vests at the testator's death even if it is not intended to commence till afterwards. There is no doubt that the annuitant can take the cash value: *Ford v. Batley* (5); but of course, if the annuity is to commence from a future date, he can only take the cash value of an annuity from that date. In *In re Mabbett* (6) the annuities were charged on land, and there was only a power to buy Government annuities arising when the land was sold, but Kekewich J. states in the widest terms the general rights of annuitants to take the value. Where, as here, no date is fixed the annuity runs from the testator's death: *Gibson v. Bott* (7); *Houghton v. Franklin* (8); *Stamper v. Pickering*. (9) When the value of annuities has to be taken for the purpose of abatement they are always calculated from the testator's death: *Wroughton v. Colquhoun* (10), and the two cases in the notes thereto; *Carr v. Ingleby* (11); *Long v. Hughes*. (12)

*Eve, K.C.*, in reply.

SWINFEN EADY J., after reading the passage from the testator's will and stating the facts above set out, proceeded:—The question raised by the present summons is whether the legal personal representatives of the widow are entitled to receive out of the estate such a sum of money as would have purchased a Government annuity.

(1) 1 Russ. & My. 606.

(2) (1797) 3 Ves. 305.

(3) 9 Ves. 6.

(4) (1853) 1 Drew. 569.

(5) (1853) 17 Beav. 303.

(6) [1891] 1 Ch. 707.

(7) (1802) 7 Ves. 89, 96.

(8) (1823) 1 S. & S. 390.

(9) (1838) 9 Sim. 176.

(10) (1847) 1 De G. & Sm. 357.

(11) (1831) 1 De G. & Sm. 362, n.

(12) (1831) 1 De G. & Sm. 364, n.



It is contended that an annuity for the widow could not have been purchased after her death, as Government annuities are granted on lives of living persons, and, therefore, that the gift of the annuity to her failed. On the other hand, it is contended by the representatives of the widow that this annuity was in the nature of a legacy; that it vested at the death of the testator, and that the subsequent death of the widow is immaterial.

SWINFEN  
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*In re.*  
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The law was stated by Sir Thomas Plumer M.R. in *Palmer v. Craufurd* (1) in this way: "The cases of *Bayley v. Bishop* (2), *Yates v. Compton* (3), and *Barnes v. Rowley* (4), have established, that where money is bequeathed to be invested in the purchase of an annuity for the life of the legatee, and the legatee dies before it is laid out, or even, as in *Bayley v. Bishop* (2), before the fund is available, as during the life of the person after whose death the investment is to be made, yet still it is a vested legacy from the death of the testator; and that the legatee for whose benefit it was intended, having survived the testator, may elect either to take the sum, or have it laid out in an annuity." It is not disputed that where there is a gift of an annuity the legatee may elect to take the value of it instead of the annuity, but it was insisted that you must have the legatee present to elect; and that in the present case the gift failed to take effect because the legatee was dead, and there was no one capable of electing. That it is not necessary for the legatee to survive the period at which the annuity is directed to be purchased appears from *Bayley v. Bishop*. (2) In that case there was a devise to the wife of the deviser for life, and after her decease to trustees upon trust to sell, and amongst other things to lay out 500*l.* in an annuity for the life of the testator's son. The son survived the testator, but died in the lifetime of the wife, and it was held, nevertheless, that that was a vested interest in the son. There the death of the son was before the period at which, according to the trusts of the will, the annuity was to be purchased, but nevertheless the son's representative took.

It was sought to distinguish that case from the present one in this way: It was said there the amount was ascertained; it was

(1) 3 Swans. 482, 487.

(3) 2 P. Wms. 308.

(2) 9 Ves. 6.

(4) 3 Ves. 305.

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a definite annuity; there was not a trust to buy an annuity of so much a year for the son, but it was to lay out a particular sum, 500*l.*, in the purchase of an annuity, and that, therefore, there was no difficulty, although the son was dead, in ascertaining the amount payable to him; that in substance it was the gift of a legacy of 500*l.* to the son after the death of the testator's widow. The reasoning of the Lord Chancellor in *Dawson v. Hearn* (1) seems to me to dispose of that argument. There the testator directed "that from and out of my monies and personal estate, an adequate sum be, within three calendar months next after my decease, laid out and invested in the purchase of a Government annuity of 250*l.* per annum, in the name and for the use of my wife during her life." What happened was this: the wife died before the annuity was actually purchased, but she survived the period of three calendar months within which it was to be purchased. The Lord Chancellor held that her personal representative was entitled to the value of the annuity, and he said: "Upon the authority of the cases which have been cited, particularly *Yates v. Compton* (2), I am of opinion that the absolute interest in this annuity vested, at the decease of the testator, in the widow. The widow had a right to have the annuity purchased, and her personal representatives have the same right." Then after discussing the cases the Lord Chancellor says of them (3): "They appear to have gone upon the principle that it is not material whether a testator gives a sum of money, and directs it to be laid out in an annuity, or gives a general direction to his executors, to lay out so much money as will be sufficient to buy a given annuity. In *Barnes v. Rowley* (4) the annuity was considered to have been vested from the death of the testator; and I can see no difference between giving a sum of money to be invested in an annuity, to be paid half-yearly to A. B., and ordering the executor to lay out so much money as shall be sufficient to buy for A. B. an annuity of a certain amount."

*Dawson v. Hearn* (1) establishes that it is not necessary for the annuitant to survive the period at which the annuity is

(1) 1 Russ. & My. 606, 611.

(2) 2 P. Wms. 308.

(3) 1 Russ. & My. 613.

(4) 3 Ves. 305.

actually purchased; that is to say, when the amount required to purchase an annuity falls to be ascertained, it is no objection that the annuitant is then dead. The amount can be ascertained retrospectively. It was done in that case. The annuitant was dead, nevertheless the amount was ascertained which would have been necessary to purchase the annuity as from a previous date. In my opinion those authorities govern the present case, and the annuity is an annuity payable as from the death of the testator. *Gibson v. Bott* (1) and *Houghton v. Franklin* (2) shew that an annuity runs from the death of the testator, and *Wroughton v. Colquhoun* (3) and the cases in the notes thereto with regard to the principle upon which annuities are to be valued, when the estate is insufficient and the annuities are valued and treated as pecuniary legacies, also assist the contention that annuities run from the death of the testator.

It follows, in my opinion, that the statement of the law in Mr. Theobald's book, 6th ed. p. 484, which was referred to by counsel for the applicant in opening the case, "that if there is a direction to purchase a Government annuity of a given amount, the annuitant is entitled to the purchase money, though he may die before the time when the annuity was to be purchased," is correct.

I determine that the legal personal representatives are entitled to such a sum as at the date of the death of the testator would have purchased a Government annuity of 400*l.* for the life of the widow.

Solicitors: *Peacock & Goddard, for H. & C. Collins, Reading; Field, Roscoe & Co., for Chalinder & Herington, Hastings.*

(1) 7 Ves. 89.

(2) 1 S. & S. 390.

(3) 1 De G. & Sm. 357.

J. R. B.

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HINDS *v.* BUENOS AYRES GRAND NATIONAL  
TRAMWAYS COMPANY, LIMITED.

[1906 H. 3156.]

*Company—Debentures—Capital and Income—Payment of Interest out of Capital—Interest on Money borrowed for the Purpose of constructing Works—Period of Construction.*

A tramway company, for the purpose of converting its undertaking to a system of electric traction, issued conversion debenture stock. The directors passed resolutions that the interest on this stock should be treated as part of the cost of construction, and chargeable to capital account during the construction of the works. The memorandum and articles of association of the company contained no provisions relating to this subject:—

*Held*, that there was no general rule of law which compelled companies to charge to revenue account interest on money borrowed for the purpose of constructing works, or prohibited them from charging it, during construction, to capital account; that in the absence of any provision to the contrary companies were entitled to act in the same way as commercial men dealing honestly in their own business; and, therefore, that the company were at liberty to charge the interest in question to capital account.

THE Buenos Ayres Grand National Tramways Company, Limited, was incorporated on March 2, 1889, with a capital which, after several changes, now consisted of 1,075,000*l.*, divided into 215,000 shares of 5*l.* each, of which 90,000 were preference shares and 125,000 ordinary shares. Clause 3 of the memorandum of association stated that the objects of the company were—(A) to construct and work tramways; (M) to borrow money by the creation and issue of, or upon, bonds, debentures, debenture stock, &c., or in such other manner as the company should think fit; (N) “to provide and pay during the construction of the works of the company out of any interest rents or moneys received from any Government municipality or person or from the investment of capital or out of any part of the profits of the company interest or dividends at such rate and for such period as the company may determine on the bonds debentures obligations or stock or shares of the company.” The memorandum



and articles contained no further provisions relating to the question in dispute.

The company borrowed large sums on debentures and preference debentures, and subsequently, for the purpose of converting their undertaking to a system of electric traction, they issued 600,000*l.* conversion debenture stock. They also issued 74,523*l.* income debenture bonds bearing interest at 5 per cent., each year's interest being payable *pari passu* exclusively out of the profits, if any, of the company made during that year and when such profit should have been ascertained and certified.

On October 19, 1906, the directors passed resolutions to the effect that (it having been ascertained that the cost of the conversion would be about 10,000*l.* per mile) the interest on the conversion debenture stock should be treated as being part of the cost of construction, and as being chargeable to capital account as from the date at which the company became liable to pay such interest up to the date at which one mile of single track was completed and open for traffic; as from that date to debit the interest charge on the 10,000*l.* conversion debenture stock applicable to that mile of single track to revenue account; and to carry out the work on that system, taking each mile separately and apportioning part of the stock to each section of the line. The result of this arrangement would be that the directors would be able to shew sufficient profit on revenue account to enable them to pay interest on the income debenture bonds.

The company commenced the works, and were carrying them out themselves without employing a contractor. The plaintiff, a shareholder in the company, issued a writ asking for a declaration that the interest on the conversion debenture stock was not part of the cost of the conversion, and ought not to be during any period whatever charged to capital account, but should be considered payable out of revenue; and an injunction to restrain the company from paying any interest on the income debenture bonds except in accordance with that declaration.

He now moved for an injunction in similar terms.

*H. Terrell, K.C.*, and *Martelli*, for the plaintiff. The company are bound to pay interest on money they have borrowed, but they

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have no right to allocate it to capital in this way. The interest is an annual payment in respect of a debt, and prima facie ought to be paid out of revenue like any of the other expenses of the business. It is analogous to the case of money borrowed for permanent improvements on settled estates, the interest on which is always kept down by the tenant for life, although during the construction of the works he gets no benefit from the expenditure. Interest is only part of the working expenses; it does not form part of the money spent on the construction of the works. Borrowed money is not capital even if it is borrowed for purposes of construction: Buckley on the Companies Acts, 8th ed. p. 591. Therefore interest on it cannot be treated as capital. No principle can be deduced from a consideration of the way in which an individual engaged in business would treat payment of interest. He is at liberty to do as he pleases. A company is bound to keep separate accounts of capital and income. It cannot charge to capital account anything which is not capital: *Bloxam v. Metropolitan Ry. Co.* (1) In that case Page Wood V.-C. said that it was clear that interest on borrowed money could not be charged to capital, and on the appeal Lord Chelmsford L.C. did not actually dissent from that view. The fact that a private Act of Parliament was obtained to settle that question shews that the learned Vice-Chancellor was right.

There is no decision precisely on this point. It has been held that dividends may be paid although the capital is deficient: *Lee v. Neuchatel Asphalte Co.* (2) Dividends may not be paid out of capital: *Verner v. General and Commercial Investment Trust* (3); *Dovey v. Cory*. (4) The same principle applies to interest on borrowed money.

[WARRINGTON J. There appears to be no legal rule on the subject. How can I say that what may be reasonable in the case of an individual must be illegal in the case of a company? I am inclined to think that the test to be applied is to consider what an ordinary honest commercial man would do.]

The question is not whether what is proposed is honest, but whether it is legal. Nothing can be charged to capital account

(1) (1868) L. R. 3 Ch. 337.

(2) (1889) 41 Ch. D. 1.

(3) [1894] 2 Ch. 239.

(4) [1901] A. C. 477.

which does not represent capital. Nothing which does not create property of the company is capital. These works are only an extension or alteration of existing property, and that is not enough : *Bardwell v. Sheffield Waterworks Co.* (1) Interest cannot be paid out of capital even when the business of the company cannot be carried on without that being done : *In re Alexandra Palace Co.* (2) The proposed scheme is impracticable. It will be almost impossible to keep the necessary separate accounts during the conversion of each separate mile of line.

*Gore-Browne, K.C.*, and *C. H. Sargent*, for the company. There is no rule that interest on borrowed money can never be charged to capital. The remarks of Lord Chelmsford L.C. in *Bloxam v. Metropolitan Ry. Co.* (3) shew that in some circumstances it may be. The directors are bringing into existence property which will in future appear in the accounts as a capital asset. If they had done this work through a contractor the aggregate sum paid to him would have included interest on borrowed money. The company will acquire an asset, and will be out of pocket to the extent of principal and interest. There are dicta in several cases which shew that no hard and fast line can be drawn between capital and income : for instance, in *Verner v. General and Commercial Investment Trust* (4) ; *Dent v. London Tramways Co.* (5) ; *Jamaica Ry. Co. v. Attorney-General of Jamaica* (6) ; *Dovey v. Cory*. (7) From these it is clear that it is not necessary that every item of expenditure should be debited against income. A company is bound to make up its accounts fairly, but there is no legal principle which defines what is to be charged to capital account and what to revenue account. It depends on the circumstances of the case. *Bardwell v. Sheffield Waterworks Co.* (1) is a direct authority in our favour.

*H. Terrell, K.C.*, in reply.

WARRINGTON J. The Buenos Ayres Grand National Tramways Company, Limited, have issued certain debentures the

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| (1) (1872) L. R. 14 Eq. 517.   | (4) [1894] 2 Ch. 239, 264, 265. |
| (2) (1882) 21 Ch. D. 149, 160. | (5) (1880) 16 Ch. D. 344.       |
| (3) L. R. 3 Ch. 337, 350, 351. | (6) [1893] A. C. 127, 136.      |
| (7) [1901] A. C. 477, 493.     |                                 |

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interest on which is payable out of the profits of each year and the profits only. The question which the Court has to determine is whether the company are bound by law to charge against the profits of the year interest on money which has been borrowed expressly for the purpose of what I may call construction. It is not literally construction—it is the conversion of their horse line into an electrical traction line, but for practical purposes it is the same thing as money borrowed for the purposes of construction. The directors propose, unless they are so bound, to charge during the period of construction as part of the expenses of constructing each mile of the new line not only the money actually expended in paying for that construction, but the interest—the proportionate part of the interest—on the money which they have borrowed. Is there anything that renders it incumbent upon the company to charge that interest to the revenue account? In the first place, it is not contended that there is anything in any of the Companies Acts which in terms compels the company so to charge this interest. Neither is there any contractual stipulation to that effect in the documents which regulate the constitution of this company. The question therefore is, Is there, independently of statute, or independently of contractual stipulations affecting this company, any general rule of law which compels a company to charge interest on money borrowed for the purposes of construction against revenue, and prohibits it from charging that interest, during construction, to capital account? That really is the question which I have to decide.

In my opinion there is no such principle of law. I think the authorities establish that the principle which regulates all these questions is that which is expressed by Lord Macnaghten in the case of *Jamaica Ry. Co. v. Attorney-General of Jamaica*. (1) He says in reference to expenditure, which prima facie in that particular case was income expenditure: “Nor is every item of expenditure necessarily to be debited wholly against the income of the period in which it occurs. It may be fair and proper to spread some items over a longer time.” Then

(1) [1893] A. C. 127, 136.



he refers to Table A of the Companies Act, and then come the words which I think are important in this case: "The company is bound to conduct its business fairly and to make up its accounts fairly, with a due regard to the obligations which it has undertaken towards the bondholders. That is the measure of the duty in this respect cast upon the directors. It would perhaps not be easy to define it more precisely."

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There are one or two other authorities which have a material bearing on this case. I do not think that *Verner v. General and Commercial Investment Trust* (1) has a direct bearing on the question, but there are some observations of Lindley L.J. which are of some assistance. He says this (2): "A company may be formed upon the principle that no dividends shall be declared unless the capital is kept undiminished, or a company may contract with its creditors to keep its capital or assets up to a given value. But in the absence of some special article or contract, there is no law to this effect; and, in my opinion, for very good reasons. It would, in my judgment, be most inexpedient to lay down a hard and fast rule which would prevent a flourishing company, either not in debt or well able to pay its debts, from paying dividends so long as its capital sunk in creating the business was not represented by assets which would, if sold, reproduce in money the capital sunk. Even a sinking fund to replace lost capital by degrees is not required by law." Now, I think Lindley L.J. had in his mind in writing that passage of his judgment the same idea which was in the mind of Lord Macnaghten when he delivered the judgment in *Jamaica Ry. Co. v. Attorney-General of Jamaica*. (3) In considering the accounts of a company the only principle by which the Court can be guided—of course unless there are some express words, express provisions, or express stipulations on the subject—is the consideration what a commercial man, acting fairly and honestly in the conduct of his business, would consider the proper thing to do. Now, I think that that is illustrated also by that case of *Bloxam v. Metropolitan Ry. Co.* (4) In that case the question which I have to determine directly arose.

(1) [1894] 2 Ch. 239.

(2) *Ibid.* 265.

(3) [1893] A. C. 127.

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Wood V.-C. thought that the interest on borrowed money ought clearly to be charged against revenue; but the matter came before the Appeal Court, and Lord Chelmsford L.C. expressed the gravest doubt without expressly dissenting as to whether there was any such stringent rule as the Vice-Chancellor had thought. It is impossible to read the judgment of Lord Chelmsford without seeing (although he carefully guarded himself against expressly dissenting) what his views were. In a subsequent case, *Bardwell v. Sheffield Waterworks Co.* (1), Malins V.-C. allowed the interest on money borrowed for the purpose of capital expenditure during construction to be added to the amount expended and to be treated as a capital charge. That is how the authorities stand. Now, what is it that the company are really proposing to do? They are creating a capital asset by means of which they will hereafter earn, or they hope to earn, profits for the company. They are not simply employing contractors to find the money and do the work. They are finding the money themselves, and they find the money by borrowing it. What does each mile of line cost them under these circumstances—what is it that they expend in constructing each mile of line, taking the amount of the borrowed money expended on that line to be 10,000*l.*, that being the company's estimate? The money is borrowed for that particular purpose—the 10,000*l.* They have to pay interest on that 10,000*l.* during the period that construction is taking place. In my opinion that asset which they are so constructing costs them not only the 10,000*l.*, but the 10,000*l.* plus the amount of interest during that period of construction; and that is what they are out of pocket during the construction of that mile of line. Now, it seems to me that the company are entitled—I do not say that they are bound to do it—if they think fit to charge in their accounts as the cost of that mile of line not only the 10,000*l.*, but the 10,000*l.* and the interest on it during the period of construction. That decides the present case. In my opinion the plaintiff's motion fails. The order had better state that the Court is of opinion that the company are not bound to treat interest payable in respect of the conversion debenture stock

during construction as chargeable against revenues and profits of the company. WARRINGTON J.

The motion was by consent treated as the trial, and the action was dismissed without costs.

Solicitors: *Budd, Johnson & Jecks; Paines, Blyth & Huxtable.*

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[1905 P. 1538.]

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*Bankruptcy—Undischarged Bankrupt—After-acquired Property—Property Vesting in Trustee—Equitable Interest in Freeholds—Intervention of Trustee—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 44, 54.*

A freehold house was conveyed to S., who was in fact a trustee for P., an undischarged bankrupt, after his bankruptcy. A lease for ninety-nine years was expressed to be executed by S. to P. under the alias of R. P. then under the same alias executed a mortgage, by demise, of the leasehold interest to the defendant for 1750l. The money was paid to P., and the whole transaction was bona fide so far as the defendant was concerned. The trustee in bankruptcy had not intervened at the date of the mortgage. He now brought this action for a declaration that he was entitled to the freehold house free and discharged from the lease and the mortgage. It was alleged that the signature of S. to the lease was forged by P., and the Court held that it had not been proved to be the signature of S. The mortgage did not therefore pass any legal estate to the defendant, but it was contended that it gave a good charge upon the bankrupt's equitable interest in the freehold:—

*Held*, that in the present state of the authorities, the proposition laid down in *Cohen v. Mitchell*, (1890) 25 Q. B. D. 262, that “until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him bona fide and for value, in respect of his after-acquired property, are valid against the trustee” must be considered not to apply to real estate, whether equitable or legal, but only to personal estate including leaseholds.

*In re New Land Development Association and Gray*, [1892] 2 Ch. 138; and *In re Clayton and Barclay's Contract*, [1895] 2 Ch. 212, discussed.

THIS action was brought by the official receiver of the bankruptcy district of the county court of Gloucestershire, as trustee of Preston, an undischarged bankrupt, for a declaration that he

NEVILLE J. was entitled as such trustee to a house at Barnet known as Hill Crest, acquired by Preston after his bankruptcy, free from and unincumbered by indentures of lease and mortgage which had been executed under the following circumstances.

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Preston was originally adjudicated bankrupt in 1893, and had never obtained his discharge. In 1894 he was convicted of forgery and sentenced to four years' penal servitude. After his discharge he resided for some time at New Southgate under the name of John Marston Birkett. Shortly before the transactions which formed the subject of this action he had changed his alias to John Hervey Redgrave, and resided under that name at New Barnet. About the same time, wishing for the purposes of a series of frauds in which he was engaged to have a corporeal representative of his former alias of Birkett, he found a social waif of the name of Sharpe and took offices for him at Chesterfield under the name of John Marston Birkett. Sharpe resided in lodgings in the town under that name, and professed to be an accountant. He was paid a small allowance by Preston to do what he was told, and was throughout the mere creature of Preston. About the same time Preston took offices at 34, Regent Street under the name of Lomax. There was a solicitor of this name, and it appeared that he had given Preston some sort of authority to use his name, but he took no part in the transactions. Preston when it was convenient personated Lomax.

At this time an auctioneer named Taylor had a house to sell at Barnet called Hill Crest, and he intimated to Preston, whom he knew as Redgrave, that the owner would take 3200*l*. Preston then sent to Sharpe a typed letter offering 3000*l*. for the house, which Sharpe signed in the name of J. M. Birkett and sent to Taylor. Correspondence followed, and it was agreed that the property should be sold to John Marston Birkett at the price of 3200*l*. A contract was signed, and ultimately by an indenture dated November 19, 1901, expressed to be made between James Bristow (the owner) of the one part and John Marston Birkett of the other part, in consideration of 3200*l*, expressed to have been paid by Birkett to Bristow, the property was conveyed by Bristow to Birkett in fee simple. This conveyance was executed by Bristow, but not by Birkett. The



purchase-money was in fact found by Preston, being paid by a NEVILLE J. cheque on an account opened by him in the name of Lomax. Lomax had been named as solicitor for the purchaser, and Preston had personated him throughout the transaction, and in his name visited the vendor's solicitors.

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By an indenture of lease dated December 20, 1901, and expressed to be made between John Marston Birkett of the one part and John Hervey Redgrave of the other part, the property was expressed to be demised to John Hervey Redgrave for a term of ninety-nine years from September 29, 1901.

By an indenture of mortgage dated February 10, 1902, and expressed to be made between John Hervey Redgrave of the one part and the defendant of the other part, the property was expressed to be demised to the defendant for the term of the lease, less one day, to secure 1750*l.* advanced by the defendant. Preston received the money, and executed the mortgage in the name of Redgrave. The defendant acted honestly throughout, and was merely deceived by Preston. The trustee in Preston's bankruptcy had not intervened or claimed the property at the date of these deeds.

In March, 1902, Preston was again adjudicated bankrupt, and his examination in this bankruptcy brought the existence of the property to the knowledge of the official receiver. He had committed a number of similar frauds, in connection with other properties, by creating a number of fraudulent leases of the same property and raising money by mortgages of all of them. He, Sharpe, and some others of his accomplices had been imprisoned in consequence of these transactions, and he was brought up in custody to give evidence at the trial of this action.

This action was commenced in 1905.

There was a doubt whether the name of Birkett in the execution of the lease of September 29, 1901, was actually signed by Sharpe or Preston. Sharpe was dead at the date of the trial, and the judge held that the evidence adduced by the defendant failed to prove that it was signed by Sharpe.

*Jenkins, K.C.*, and *Cordery*, for the plaintiff. Sharpe was the mere creature and tool of the bankrupt. Our contention is that

NEVILLE J. it was the bankrupt who, under the name "J. M. Birkett," signed the contract for the purchase of Hill Crest and took the conveyance of that property. It was he who, under his alias of "Lomax," investigated the title, attended the completion, paid the purchase-money, and took the title deeds which remained in his possession. If this be so, then he acquired the legal estate in the property, and under s. 44 of the Bankruptcy Act, 1883, it passed to the plaintiff as his trustee in bankruptcy. We also contend that it was the bankrupt who, under the alias of "J. M. Birkett," executed the lease of Hill Crest to himself under the name of "Redgrave," and that the lease is a nullity. But if Hill Crest was conveyed to Sharpe under the name of J. M. Birkett, then Sharpe was a bare trustee for the bankrupt, that is, for the plaintiff as his trustee in bankruptcy. In this view of the case the plaintiff's estate was equitable, and different considerations might arise. But our contention is that Sharpe took no estate, either legal or equitable.

*Upjohn, K.C.*, and *Kirby*, for the defendant. Our contention is that the legal estate in fee simple passed by the conveyance of November 19, 1901, to Sharpe as trustee for Preston, because the name John Marston Birkett was then an alias under which Sharpe was passing. We claim that we have proved that the lease of December 20, 1901, was executed by Sharpe, and, as he had the legal estate, the lease was good, and the subsequent mortgage to the defendant was good.

[NEVILLE J. I think that the legal estate vested in Sharpe, but I do not think that you have proved that Sharpe executed the lease.]

If Sharpe did not execute the lease, Preston executed it as his agent and by his authority, and it would be good. But even if the lease is void, the mortgage is good as a charge upon Preston's equitable interest in the fee. There is no doubt the money was paid, and the contract to give a mortgage created an equitable charge on any property the bankrupt could charge. He could deal with any equitable interest he had until the trustee intervened: *Cohen v. Mitchell*. (1) It is true that in *In re New Land Development Association and Gray* (2) Chitty J. decided that the

(1) 25 Q. B. D. 262.

(2) [1892] 2 Ch. 138.

rule in *Cohen v. Mitchell* (1) did not apply to real estate, but in NEVILLE J. the Court of Appeal the case was decided on a different ground. That was a case of a legal estate in fee. It does not apply to an equitable estate in land. In *In re Clayton and Barclay's Contract* (2) Chitty J. held that leaseholds were within the rule laid down in *Cohen v. Mitchell* (1), refusing to extend any further the exception he had made in the case of real estate. The rule was specially laid down by the Court of Appeal in *Cohen v. Mitchell* (1) in the widest possible terms, and ought to be followed in every case except where it has been decided that it does not apply.

*Jenkins, K.C.*, in reply. I do not admit that the legal estate passed from Bristow to Sharpe by the deed of conveyance. Assuming for the purposes of the argument that it did, the only question is whether the exception made by *In re New Land Development Association and Gray* (3) confined in favour of land is confined to legal estates in land. There is no reason why it should be so confined. The reasons given by Chitty J. for the exceptions apply to equitable as well as to legal estates. His judgment and the interlocutory remarks of the Lords Justices in the same case shew that they thought the rule in *Cohen v. Mitchell* (1) did not apply to any kind of real estate. In *Bird v. Philpott* (4) Farwell J. held that he was bound to follow Chitty J.'s decision, though if he had held that it did not apply to an equitable estate it would have given him a simpler way to the decision at which he arrived. The decision was also followed in *London and County Contracts, Ltd. v. Tallack*. (5) *In re Clayton and Barclay's Contract* (2) was decided simply on the ground that leaseholds are personalty. The Court will follow the general trend of the decisions since the first case before Chitty J. by applying the exception to all interests in real estate.

NEVILLE J. In this case the defendant was cozened out of a considerable sum of money which he advanced, as he supposed, upon the security of a certain property in New Barnet known as Hill Crest, and in respect of which he obtained what he

(1) 25 Q. B. D. 262.

(3) [1892] 2 Ch. 138.

(2) [1895] 2 Ch. 212.

(4) [1900] 1 Ch. 822.

(5) (1903) 51 W. R. 408.

NEVILLE J. conceived to be a mortgage. The circumstances which led to the present action were these. [His Lordship then stated the facts as above down to the execution of the conveyance of November 19, 1901, and proceeded:—] Now what was the result? It is said on the one hand that J. M. Birkett being an alias as well of Preston as of Sharpe, and Preston being the real person interested, I ought to hold that the effect of the conveyance was to transfer the legal estate to Preston and not to Sharpe. With regard to that, I do not think the nature of the fraud was that the property should be conveyed to Preston. I think that J. M. Birkett had been materialized and located at Chesterfield for the purpose of being produced, if necessary, and personating the J. M. Birkett who had formerly been an alias of Preston's: I think that at the date when the conveyance was executed Preston was not passing, when he could help it, under the name of Birkett, but under the name which he had more recently adopted of Redgrave. I know of no law which enables me to say that a conveyance to the mere puppet or tool of a person who finds the money, even although that puppet or tool is passing under an assumed name, passes the legal estate direct to the real purchaser. It is quite true the equitable doctrine is different, and that the equitable interest in the estate would, in consequence of the finding of the money by Preston, vest in him. Therefore, upon the best conclusion I can come to under the circumstances, the result of the conveyance was to vest the legal estate in Sharpe, and to vest the equitable estate either in Preston or in Preston's trustee in bankruptcy. In which of those two the equitable estate did vest depends upon the meaning of the decisions which I have been referred to.

Before I proceed to consider the true legal effect of those cases I must proceed a little further with the history of the case. [His Lordship then examined at length the evidence as to the execution of the lease, and proceeded:—] The conclusion I have come to is that, in this case, the lease was not signed by Sharpe, but was signed in the name of J. M. Birkett by Redgrave.

But before I leave this part of the subject I should like to express my very strong disapproval of the manner in which Preston was dealt with on the present occasion. Preston came



up, it is true, in the custody of the warders of his prison, NEVILLE J but he was permitted free intercourse with the witnesses in the case and allowed to intermingle with the people in Court. I hope that in future where criminals are, during their sentence, brought into Court for the purpose of giving evidence, they will not be allowed to communicate with the witnesses in the case. I am by no means sure that the evidence of two of the witnesses called in the present case, Simmons and Wynne, was not affected by the communications, which in one case were admitted, and in the other case I myself observed, between the witness and the bankrupt.

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As the lease was not executed by Sharpe, the legal estate is not vested in the defendant. The question is between two litigants both of them claiming equitable interests, and, if the view I take is correct, the equitable estate in the fee would vest in the trustee in Preston's bankruptcy, subject to the question of law, at a date prior to the vesting of any equitable estate in the defendant as mortgagee. That brings me down to the single point for consideration: Did the equitable estate in the fee vest in the trustee in bankruptcy upon the execution of the conveyance to Birkett, or did it not vest until some intervention by him? If the latter be correct, there was no intervention on his part till too late to entitle him to priority over the defendant in the present case.

With regard to that I have to consider the meaning of the cases to which I have been referred, and I start with the case of *Cohen v. Mitchell*. (1) The proposition there laid down is no doubt a proposition sufficiently wide to cover property of all descriptions whether real or personal, and the proposition is to the effect that, with regard to after-acquired property of the bankrupt, that property does not vest in the trustee until some intervention on his part has taken place, where the bankrupt has had dealings with the property which, so far as the other person is concerned, were bona fide dealings. Now the consideration of that case came before Chitty J. in the case of *In re New Land Development Association and Gray*. (2)

There the question was whether that proposition was applicable

(1) 25 Q. B. D. 262.

(2) [1892] 2 Ch. 138.

NEVILLE J. to the case of the purchaser of real estate to one undivided moiety of which a person was entitled and which he had, in conjunction with his co-tenant, conveyed to the purchaser, he being at that time an undischarged bankrupt. Chitty J. held that it was not, and what he says with regard to it is this. He first of all refers to the Bankruptcy Act, and then he says (1): "Reading these three sections without referring to any of the authorities, it seems clear that a moiety of this real estate, which devolved upon the bankrupt W. Shurley before his discharge, is after-acquired property which vested in the official receiver as trustee." That is to say—because what the learned judge says there applies with equal force to personal estate—if you were to read the Act of Parliament without the assistance of the decisions that have been come to by the Court, there could be no doubt that after-acquired property vests in the trustee similarly to property possessed by him at the time of his bankruptcy. But then he says: "But it is unquestionable that there has been a series of decisions on this Act, and on similar earlier Acts, which shew by judicial interpretation, that the language of the Legislature as to the after-acquired property of the bankrupt is not to be read exactly as it stands—in other words, the Courts have decided that there are exceptions from the property which *prima facie* ought to vest in the trustee as after-acquired property; the decisions include, money earned by a bankrupt in carrying on a business; they include, choses in action, and other personal estate belonging to the bankrupt, and goods and chattels; but I know of no decision that the principle upon which these authorities are founded includes real estate." Now the meaning of that I take to be this, that when you read the Act of Parliament in the light of the decisions of the Court, you find that after-acquired property, so far as it consists of personal property, does not vest in the trustee until intervention on his part, but he excludes the extension of that exception to the vesting of property in the bankrupt's trustee in the case of real estate. He gives a reason for that. He says (2): "The argument really amounts to this, that after-acquired real estate vests in the bankrupt, and remains vested in him till the trustee, by oral

(1) [1892] 2 Ch. 142.

(2) [1892] 2 Ch. 145.

request or by a letter, intervenes and claims it; and thereupon the legal estate shifts and passes to the trustee. It was not suggested that any conveyance is necessary; it is said that the legal estate passes by virtue of the statute, by an assurance hitherto unknown to the law—i.e., on an oral request, possibly verified by statutory declaration, or by virtue of a letter, which, as a record of the transactions, would have to be preserved as a document of title. I think this is too wide a departure from the words of the Act of Parliament.” Therefore he excludes real estate from the operation of the judicial decision on the ground that it involves a shifting of the legal estate which he thinks is not established by the cases.

Now, so far as the principle of the thing goes, I confess I do not see why, if you are depending on the construction of the statutes, as you undoubtedly are and profess to be in these decisions, the statute should not just as well have declared the legal estate to shift upon the intervention of the trustee from the bankrupt to the trustee, as declared property in personalty to shift on the intervention of the trustee from the bankrupt to the trustee. But there is the decision, and it was taken to the Court of Appeal, but unfortunately for me the case was not decided by the Court of Appeal upon that point. As I understand it, the learned judges who did decide it approved, so far as their opinion went, of the decision of Chitty J. in that respect. Both Kay L.J. and Lindley L.J. made interlocutory remarks in the course of the argument in which they excluded real estate from the operation of the rule in *Cohen v. Mitchell* (1), and real estate is used by them apparently without reference to the question of whether they are dealing with legal real estate or only with an equitable real estate. I think it would be impossible for me, in the face of that expression of opinion on the part of the Lords Justices, to differentiate in the present case between a legal fee and an equitable fee in land.

To make the difficulty greater, as it appears to me, the question of leaseholds has been, at a later period, considered by the same judge, Chitty J., in the case of *In re Clayton and Barclay's Contract*. (2) He there comes to the conclusion that a leasehold

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(1) 25 Q. B. D. 262.

(2) [1895] 2 Ch. 212.

NEVILLE J. interest is within the proposition in *Cohen v. Mitchell* (1), and is not affected by the decision in *In re New Land Development Association and Gray*. (2) What he says about it is this (3):

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“Possibly some of the reasons that I gave for the exception of real estate might apply, but with diminished force, to the case of a lease for a term of years with covenants; but I have now to consider whether any such reasons would justify me in introducing this further limitation. It appears to me that I ought not to attempt to introduce any further limitation. The language of the Court of Appeal in *Cohen v. Mitchell* (1) is large enough to include all property, and certainly large enough to include a chattel interest in land; and I think that I ought to consider myself bound, as I do, by the proposition that they laid down, and that this case falls within it.” Now there he draws a distinction between a leasehold interest in real estate and a freehold interest in real estate which I confess I find very great difficulty in understanding on any broad principle. It is quite true that in one case you are dealing with a chattel or personal estate and in the other with real estate. But why there should be a distinction between real and personal estate in this regard I confess I do not think has been satisfactorily explained by the decisions which have been cited to me. But as I said before, I think that it is proper for me to follow the opinion expressed by the Lord Justice and not to differentiate between an equitable interest and a legal interest in real estate, but to treat the matter at present as lying between the broad divisions of property, real estate on the one hand and personal estate on the other hand. That is consistent with all the decisions which have hitherto been come to, and that, I think, is the proper conclusion to arrive at.

I can only say that I hope either in this case or in some case at no distant date the matter may come before the Court of Appeal in order that it may be put on a more satisfactory footing than I confess I think it stands on at present.

Solicitors: *Burgess, Taylor & Tryon; Phelps & Wallace.*

(1) 25 Q. B. D. 262.

(2) [1892] 2 Ch. 138.

(3) [1895] 2 Ch. 215.



## NITEDALS TAENDSTIKFABRIK v. BRUSTER.

NEVILLE J.

[1905 N. 1622.]

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July 21, 23

*Principal and Agent—Numerous Transactions—Dishonesty in some—Right to retain Commission—Sole Agent for Sale of Principal's Goods—Selling Goods of rival Traders—Account of Profits.*

Where the transactions between a principal and his agent are severable, and in some of them the agent has been honest whilst in others he has been dishonest, he is entitled to his commission in all the instances in which he has been honest, but is not entitled to it in all the instances in which he has been dishonest.

*Andrews v. Ramsay & Co.*, [1903] 2 K. B. 635, discussed.

When an agent, bound to sell only his principal's goods, in breach of his duty sells the goods of his principal's competitors in trade, he must account to his principal for the profits he has made on all such sales.

## ACTION.

The plaintiffs were a company incorporated under the laws of Norway, and carried on business at Christiania in Norway as manufacturers and exporters of and dealers in matches. The defendant was a mercantile agent in London. By a written agreement dated November 30, 1901, the plaintiffs appointed the defendant their sole agent at a commission for the sale of their matches in Great Britain and Ireland, and their agent for the export of their safety matches; and the agreement also provided that the defendant should use his best endeavours on behalf of the plaintiffs and should not, while representing them, sell matches for or made by any other firm. The course of dealing between the plaintiffs and the defendant was for the defendant to forward to the plaintiffs all the orders for their goods that he obtained, and the plaintiffs, if they accepted the orders, despatched the goods from Norway and at the same time sent the defendant the invoices and shipping documents of the goods to be forwarded by him to the customers to enable the latter to obtain delivery of the goods. In October, 1905, the plaintiffs discovered that the defendant, in breach of his said agreement with them, had (amongst other things) for some time

NEVILLE J. been selling to their customers matches made by other firms at a profit which he had retained ; and had also in numerous instances not forwarded the plaintiffs' invoices to customers, but had forwarded to customers his own invoices at an increased price and had retained for himself the excess price. The plaintiffs thereupon determined the defendant's agency, and brought this action for an account and payment by him of the secret profit he had made on the above transactions. They also claimed payment by the defendant of the sum of 2099*l.* 2*s.* 4*d.*, which was the amount he had retained in respect of his commission under the agreement. The defendant admitted that he had on some occasions committed the breaches complained of ; but, as to the sales of matches made by other firms, he alleged that they were of a different quality, and did not really interfere with the plaintiffs' trade ; and he claimed to retain the 2099*l.* 2*s.* 4*d.* as his commission under the agreement. It was conceded that there must be an account, and the main question was whether the defendant was entitled to his commission.

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*Upjohn, K.C.*, and *Waggett*, for the plaintiffs. The defendant has been systematically fraudulent, and is not entitled to any commission : *Salomons v. Pender* (1) ; *Andrews v. Ramsay & Co.* (2) The difference between an honest mistake and fraud or dishonesty is pointed out in *Hippisley v. Knee Brothers.* (3) The defendant has also, in breach of his duty, sold to the plaintiffs' customers matches made by rival manufacturers, and must account for the profit he has made on those sales : *Dean v. MacDowell* (4) ; *Aas v. Benham.* (5)

*Greaves*, for the defendant. Admitting that the defendant has committed grave irregularities, it is submitted that his conduct has not been such as to disentitle him to his commission, not only in respect of all improper sales, but also in all cases where he has been honest. Both *Salomons v. Pender* (1) and *Andrews v. Ramsay & Co.* (2) are cases of commission in respect of a single dishonest transaction, and in *Hippisley v. Knee Brothers* (6)

(1) (1865) 3 H. & C. 639.

(2) [1903] 2 K. B. 635.

(3) [1905] 1 K. B. 1.

(4) (1878) 8 Ch. D. 345, 351, 354.

(5) [1891] 2 Ch. 244.

(6) [1905] 1 K. B. 9.

Kennedy J. points out that the transactions of an agent may be separable. It is submitted that the defendant here is entitled to his commission in all the sales in which he has acted honestly. Then as to the sales of matches made by other manufacturers, on the evidence they were a different class of match and did not really compete with the plaintiffs' goods, and the plaintiffs have suffered no real damage.

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*Upjohn, K.C.*, in reply.

[NEVILLE J. I do not want to hear you unless you contend that the defendant is not entitled to any commission at all.]

The evidence shews deliberate and systematic fraud by the defendant during the years 1904 and 1905, and in *Andrews v. Ramsay & Co.* (1) Lord Alverstone C.J. lays down the general principle that "it is only the honest agent who is entitled to any commission."

[NEVILLE J. The general rule is that an agent is entitled to his commission. That case is an exception to the general rule, and of course it binds me. But it is the case of a single dishonest transaction, and I am not disposed to extend it to a case where the transactions may be separable. Suppose a man employed an estate agent to sell for him 100 houses, and the agent made a secret profit on the sale of one house, but acted honestly in the sale of the other 99 houses. Is the principal entitled to put into his pocket the agent's commission on the whole of the 100 houses?]

It is submitted that the analogy does not apply to the present case. Here the contract is not severable. The real point is that the agent is claiming his remuneration under the contract which he has broken. He has been deliberately dishonest on numerous occasions, and has therefore forfeited his commission.

NEVILLE J. In this case it is not disputed that there must be an account, and I need add but little. By an agreement made in November, 1901, the plaintiffs appointed the defendant their sole agent for the sale of their matches in Great Britain and Ireland, and their agent for the export of their safety matches. The defendant was to use his best endeavours for and on behalf of the

(1) [1903] 2 K. B. 635, 638.

NEVILLE J. plaintiffs, and it was one of the terms of the agreement that the  
1906 defendant, while representing the plaintiffs, was not to sell  
NITEDALS matches for or made by any other firm, and the defendant was  
TAENDSTIK- to receive certain commission in respect of the business that  
FABRIK he transacted. The defendant entered upon the agency, and  
v. in the course of that agency he in many cases pursued  
BRUSTER. the following course—that, whereas the plaintiffs invoiced  
direct to the customer and forwarded the invoice to their agent  
to be sent on to the customer, the agent did not forward that  
invoice to the customer, but forwarded an invoice made out in  
his own name, as agent for the plaintiffs, at a different and  
increased price from the price stated in the plaintiffs' invoice,  
and retained for himself the excess in the price whilst he  
only credited the original price to the plaintiffs. I think that  
was a dishonest act on the part of the defendant, and a dishonest  
act in each case. Further than that, the defendant, having  
agreed not to sell matches made by other firms, has in breach of  
that agreement sold to the plaintiffs' customers matches made by  
their competitors in trade. It appears to me that these sales were  
within the scope of the agency which the defendant had under-  
taken. I hold, therefore, that the defendant must account for all  
the profits that he has made by these transactions. That disposes  
of two of the questions which I have to decide, but the serious  
question remains whether, under the circumstances, the defendant  
is entitled in taking the accounts to charge any commission  
whatever. Having regard to the decision in *Andrews v. Ram-  
say & Co.* (1), it is clear that the defendant is not entitled to  
charge any commission in all the cases where he has credited a  
price to the plaintiffs other than that received by him from the  
customer. But I am asked to say that he is to have no com-  
mission in any case where he acted properly under his agency  
as well as in the cases where he acted improperly. Having  
regard to what is said in *Andrews v. Ramsay & Co.* (1), I feel  
there is a difficulty about the matter, but the conclusion I have  
come to is this, that the doctrine there laid down does not apply  
to the case of an agency where the transactions in question are  
separable, as I think they are in this case, and does not entitle

(1) [1903] 2 K. B. 635.



the principal to refuse to pay commission to his agent in cases where he has acted honestly because there are other cases in which the agent, acting under the same agreement, has acted improperly and dishonestly. I think, therefore, that in this case in every instance where the transaction is one in which the defendant has acted within the terms of his contract, and has credited his principals with the full amount received by him from the customer, the commission ought to be allowed, but in all the instances in which he has acted dishonestly it should be disallowed. The account will be taken on that footing, and of course, as I have said, he must also account for the secret profits he has made.

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Solicitors : *Wilson, Bristows & Carpmael ; E. T. Lea.*

H. L. F.

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[1905 A. 1288.]

July 11, 12,  
13.  
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*Company—Powers—Ultra Vires—Railway Company—Dock Company—Amalgamation—Water obtained from Land acquired for Purposes of Railway—Supply to Dock—North Eastern Railway (Hull Docks) Act, 1893 (56 & 57 Vict. c. cæcviij.), ss. 4, 7 (i.), (iv.), 31 ; Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 39.*

The undertaking of a dock company was amalgamated with that of a railway company by a special Act of Parliament, which provided that the undertakings so amalgamated should constitute one undertaking and be the undertaking of the railway company. The Act further provided that none of the provisions of the Acts relating to the dock company and to the railway company respectively which if the amalgamation had not taken place would apply exclusively to the dock undertaking or to the railway, as the case might be, should apply to any other portion of the undertaking of the continuing company, and Part V. of the Railways Clauses Act, 1863, which was incorporated with the amalgamating Act, contained an analogous provision with regard to the powers of the dissolved company. Before the amalgamation the dock company had been supplied with water by a neighbouring corporation. After the amalgamation the railway company ceased to take water from the corporation, and supplied the dock with water which they obtained

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from land originally acquired by them for the purposes of their railway. In an action against the company by the Attorney-General at the relation of the corporation:—

*Held*, that the amalgamating Act created a complete working and administrative union of the two undertakings subject to the restrictions contained in that Act and in the Railways Clauses Act, 1863, and that the defendants in supplying water to the dock in the manner complained of were not acting ultra vires.

Decision of Joyce J., [1906] 1 Ch. 310, affirmed.

APPEAL from a decision of Joyce J. (1)

The action was brought by the Attorney-General at the relation of the corporation of Kingston-upon-Hull against the North Eastern Railway Company for a declaration that it was ultra vires for the defendant railway company to supply a certain dock belonging to them at Kingston-upon-Hull with water obtained from land forming part of their railway undertaking for any purpose connected with the dock, or to sell or supply water so obtained to any of their tenants occupying premises within the dock or to any ship using the dock, or otherwise to carry on the business of a water company. This dock originally formed part of the undertaking of the Hull Dock Company, and it was connected with the defendants' railway by lines of rails which were laid on the quays and joined the defendants' railway just outside the dock gates.

By the North Eastern Railway (Hull Docks) Act, 1893, the undertaking of the dock company was amalgamated with the undertaking of the defendant company, and since July 1, 1893, the date of the amalgamation, the dock had been vested in and worked by the defendant company.

Before the amalgamation all the fresh water required for the various purposes of the dock company was supplied by the corporation of Kingston-upon-Hull. This water was supplied by the corporation direct to the dock company, and was then distributed by the company. The dock company used the water partly for working and cleansing the dock, partly for supplying ships coming into the dock, and partly for supplying tenants occupying shops and factories within the precincts of the dock. These tenants dealt in various articles required by ships using

(1) [1906] 1 Ch. 310.

the dock, which was chiefly frequented by fishing boats, and they included fish buyers, fish curers, and ice makers.

After the amalgamation the water was supplied by the corporation in the same way to the defendant company until September 15, 1903. The defendants then stopped the supply of the corporation, and since that date they had supplied the dock and the ships and the tenants with water pumped from wells on land at Hessle, which had been acquired by them under a special Act of 1836 for the purpose of their railway undertaking. For the purposes of this supply the defendants enlarged their pumping station at Hessle, and laid down pipes alongside of their railway to convey the water to the dock.

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The water supplied to the ships and to the dock tenants was charged for by the railway company.

The material sections of the North Eastern Railway (Hull Docks) Act, 1893, provided as follows:—

“4. As on and from the first day of July one thousand eight hundred and ninety-three which date is in this Act referred to as ‘the date of amalgamation’ and subject to the provisions of this Act the Dock Company shall be and is hereby dissolved and the undertaking of the Dock Company is hereby as from the date of amalgamation amalgamated with the undertaking of the Railway Company and thenceforward the two undertakings so amalgamated shall constitute one undertaking which shall be the undertaking of the Company. . . .”

“7. Notwithstanding the amalgamation of the undertaking of the Dock Company with the undertaking of the Railway Company—

“(i.) None of the provisions of the Acts relating to the Dock Company which if the amalgamation had not taken place would apply exclusively to the undertaking of the Dock Company or to the Dock Company in respect thereof shall apply to any portion of the undertaking of the Company other than the dock undertaking or to the Company in respect thereof; (ii.) None of the provisions of the said Acts relating to the constitution accounts or capital or to the appointment of an auditor by the Dock Company shall apply to the Company; (iii.) None of the provisions of the said Acts or of any other Acts relating to the directors of

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the Dock Company shall apply to the Company; (iv.) None of the provisions of the Acts relating to the Railway Company which if the amalgamation had not taken place would apply exclusively to the railway and the traffic thereon shall apply to the dock undertaking or to the Company in respect thereof."

Sect. 31. "The Company shall keep the accounts of their dock undertaking at Hull separate from the accounts of their railway undertaking."

The amalgamating Act by s. 2 incorporated Part V. (relating to amalgamation) of the Railways Clauses Act, 1863, which, so far as material, provided as follows:—

Sect. 37. "For the purposes of this part of this Act, the companies shall be deemed amalgamated by a special Act, in either of the following cases: (1.) Where by the special Act two or more companies are dissolved, and the members thereof respectively are united into and incorporated as a new company: (2.) Where by the special Act a company or companies is or are dissolved, and the undertaking or undertakings of the dissolved company or companies is or are transferred to another existing company, with or without a change in the name of that company: And in this part of this Act, such special Act is referred to as the amalgamating Act; the company incorporated or continued by or under the amalgamating Act is referred to as the amalgamated company; and the time prescribed in the amalgamating Act for the amalgamation taking effect . . . is referred to as the time of amalgamation."

Sect. 39. "The special Acts relating to or affecting the dissolved company or their undertaking in force at the passing of the amalgamating Act, shall, except so far as they are thereby expressed to be varied or repealed, remain in full force; and all rights and powers thereby conferred on and vested in the dissolved company in relation to their undertaking may be enjoyed and exercised by the amalgamated company in relation to the dissolved undertaking; and all matters to be done, continued, or completed, or which but for the amalgamation would, might, or could be done, continued, or completed, by the dissolved company, or their directors, officers, or servants, under or by virtue of those Acts, shall or may be done, continued, or completed by the



amalgamated company, and their directors, officers, and servants, as the case may be; and every special Act, so far as it relates to or affects the dissolved company or their undertaking, shall be read and construed as if the name of the amalgamated company had been used therein in relation to that undertaking instead of the name of the dissolved company."

Joyce J. held that the supply of water by the railway company in the manner complained of was not ultra vires, and dismissed the action.

The relators appealed.

*Danckwerts, K.C.*, and *R. J. Parker*, for the appellants. The acts complained of in this action are ultra vires, unless they can be justified either under the dock company's Acts or under the railway company's Acts, or under the amalgamating Act. A statutory company can only do what it is expressly authorized to do, and what is reasonably necessary and incidental to what it is expressly authorized to do, and if it acquires land under its statutory powers for one purpose it cannot use it for another: *Bostock v. North Staffordshire Ry. Co.* (1); *Attorney-General v. Pontypridd Urban Council* (2); *Attorney-General v. Great Northern Ry. Co.* (3); *London County Council v. Attorney-General* (4); *Attorney-General v. Mersey Ry. Co.* (5)

[*VAUGHAN WILLIAMS L.J.* referred to *Lyde v. Eastern Bengal Ry. Co.* (6)]

Before the amalgamation the dock company might have bought and used water for the purposes of the dock, and the railway company might have bought and used water for the purposes of the railway, and if either company had a water supply of its own it might have used it for the purposes of its undertaking, inasmuch as water was necessary for the undertaking in each case. But the dock company had no power to use water for the purpose of supplying ships frequenting the dock, or for the purpose of supplying trade tenants on the dock premises,

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(1) (1855) 4 E. & B. 798; (1856) 3 Sm. & Giff. 283.

(2) [1905] 2 Ch. 441; [1906] 2 Ch. 257.

(3) (1860) 1 Dr. & Sm. 154.

(4) [1902] A. C. 165.

(5) [1906] 1 Ch. 811.

(6) (1866) 36 Beav. 10, 16.

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because such user was not reasonably incidental to its authorized purposes, and for the same reason the railway company clearly had no power to supply water either to the docks or to the tenants on the dock premises, or to the ships using the docks. There cannot be found in the special Acts of either company any provision authorizing that company to act as a waterworks company, and that in substance is what the railway company is doing. The amalgamation makes no difference. Part V. of the Railways Clauses Act, 1863, explains what is meant by the amalgamation of two companies, and in particular s. 39 shews that where the undertakings of two companies are amalgamated the powers of each company are to be used by the continuing or amalgamated company only for the purposes for which they could have been used before. There is to be no commingling of the powers, but they are to be kept strictly in separate compartments. The amalgamating Act of 1893 is to the same effect. It confers no new powers at all; it merely transfers the dock undertaking to the railway company and places both undertakings under one management. It does not enable the railway company to use land acquired by it for railway purposes for the purposes of the dock, or vice versa. It may be contended that the user complained of is impliedly authorized by the use of the word "amalgamation," but "amalgamation" in this connection can have no other effect than that given to it by the Railways Clauses Act, 1863, and there is therefore no ground for this contention: *West Derby Union v. Metropolitan Life Assurance Society*. (1) There being, therefore, no express or implied authority, either in the amalgamating Act or in any other Act, to the railway company to supply water in the manner complained of, the railway company is acting ultra vires in so doing, and the appellants are entitled to relief.

*Sir R. B. Finlay, K.C., Hughes, K.C., and Gutch, for the respondents.*

VAUGHAN WILLIAMS L.J., after stating the nature of the action from the head-note in the report of the case in the Court below, continued as follows:—In order to ascertain what is the meaning

(1) [1897] A. C. 647, 657.

of the provisions of the special Act in this case, one must read not only the provisions of the special Act itself, but the provisions of the incorporated Acts. One of the most important of the provisions included in the special Act (by s. 2) is Part V. (relating to amalgamation) of the Railways Clauses Act, 1863. I will first read the provisions of the special Act itself. [His Lordship read s. 4.] Now if that section stood alone, unaffected by other sections in the special Act itself and unaffected by the provisions in Part V. of the Railways Clauses Act, 1863, relating to amalgamation, I do not suppose that anyone would doubt but that the effect of the amalgamation was that thenceforward the two undertakings so amalgamated should constitute one undertaking, which should be the undertaking of the continuing company, that is, the railway company. But undoubtedly one does find provisions in the special Act which ought to be taken into consideration on the construction of this section. Indeed, the section says so in terms itself, because it says "and subject to the provisions of this Act." The principal sections which are relied upon in the special Act as likely to affect the construction of s. 4 are s. 7 and s. 31. [His Lordship read s. 7.] I can only say myself that it does not seem to me that there is anything in that section which is inconsistent with what I call the plain words of s. 4, providing that after the amalgamation "the two undertakings so amalgamated shall constitute one undertaking, which shall be the undertaking of the company," that is, the continuing company. On the contrary, it seems to me that the very form of s. 7 leads one to the conclusion that the natural and plain construction of the words of s. 4 as they stand is the construction which the Legislature intended by the Act of Parliament. If that was not the intention of the Legislature there was no necessity really for the passing of s. 7 at all, and certainly no necessity for the provision in sub-s. (i.), which says that "none of the provisions of the Acts relating to the dock company which if the amalgamation had not taken place would apply exclusively to the undertaking of the dock company . . . shall apply to any portion of the undertaking of the company other than the dock undertaking," and the corresponding provision in sub-s. (iv.) with respect to the provisions of the railway company's Acts. The other section

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which was principally relied upon was s. 31. That section provides that "the company shall keep the accounts of their dock undertaking at Hull separate from the accounts of their railway undertaking"; and it is said that, because there is that provision for keeping separate accounts, therefore we ought not to give to the provision in s. 4, that after the amalgamation the two undertakings shall constitute one undertaking, which shall be the undertaking of the continuing company, its natural meaning. I cannot see any ground for drawing that inference from this provision in s. 31 about the accounts. There are a number of reasons why the accounts of the dock company and the accounts of the railway company should be kept separate after the amalgamation had taken place. Merely to give one instance, there were outstanding mortgages based upon the takings of the dock company; and it was obviously convenient that the accounts of the dock company should be kept separate for purposes of that sort. This is only one instance, and even if that one instance is not for any reason—I do not pretend to have read the Acts of Parliament from end to end—applicable in the present case, there are abundant and obvious reasons why for accounting purposes the accounts should be kept separate after the amalgamation, reasons which are not in the slightest degree inconsistent with giving to the words of s. 4 their natural meaning. Having stated that much about the provisions of the special Act considered by themselves, I propose now to deal with what has been the effect of the special Act in reference to amalgamation after taking into consideration those sections of Part V. of the Railways Clauses Act, 1863, which relate to amalgamation. [His Lordship read ss. 36, 37, and 39 of the Act of 1863.] Now it will be observed that what is said in s. 39 is that the powers of the dissolved company may be exercised in relation to the dissolved undertaking, and it is said that the necessary effect of those words is that nothing whatsoever can be done by the amalgamated company, that is, by the railway company, by virtue of the land of the dissolved company having passed to the amalgamated company, which the railway company could not have done before the amalgamation. In so far as powers strictly are concerned—I am speaking now only for myself—in my judgment, that is the meaning of s. 39. But



if it is said that that section covers every act done by the railway company on the land of the dock company, which has now been transferred to the railway company as the amalgamated company, I do not agree. I limit the operation of the word "powers" strictly to powers, just as in s. 7 of the special Act I limit the operation of the word "provisions" strictly to provisions. But there is another argument which Mr. Danckwerts and Mr. Parker based upon s. 39; they used s. 39 and its provisions as an argument to shew that one was not to read the words in s. 4 of the special Act, "thenceforward the two undertakings so amalgamated shall constitute one undertaking, which shall be the undertaking of the company," in their natural sense, because it is said, assuming that s. 39 only transfers the powers strictly speaking of the dock company to the amalgamated company in relation to the undertaking of the dock company, it is extremely improbable that the Legislature should have intended the express powers not to be transferred, and yet have intended the powers which arise from the transfer of the property in the land or otherwise to be transferred, and to be so transferred that they may be exercised by the railway company, the amalgamated company, not only upon the land acquired by the dock company, but also upon the land acquired by the railway company and vice versa. I do not say myself that that argument is entirely unreasonable, but I do say that in my opinion it is outweighed by other considerations. It seems to me that the practical difficulties of carrying out this amalgamation would be enormous if one were to hold that it was impossible for the railway company to give any benefit to the dock company's premises from the exercise by the railway company of its rights of property over land acquired by the railway company, or if one said that it was impossible for the amalgamated company, when dealing with the dock company's undertaking and property, to take advantage of the fact that the railway company, by the possession of its property, could in its user effect good and useful work for the dock company. I think that such a construction would, as I have said, lead to insuperable difficulties in the administration and working of the amalgamated company. In truth and in fact, when a variety of

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instances were put to Mr. Danckwerts and Mr. Parker to test the question whether, after the amalgamation, this or that user of the land was one for the benefit of the two companies jointly, and could continue lawfully to be done, in nearly every one of the cases which were put to them they were forced substantially to admit that it could not have been the intention of the Legislature that such a user should not be lawful. I only take one example at the present moment as an instance illustrating the many cases which were put to counsel for the appellants in the course of their argument. Romer L.J. asked Mr. Parker whether he would say that there might not be built by the amalgamated company on the railway ground a central office for taking accounts, or a central office from which the orders of both companies might be issued. Of course, Mr. Parker had to say No, he did not contend that; but he went a step beyond Mr. Danckwerts, I think. When these difficulties were put to Mr. Danckwerts he did not make any distinct admission about them, but rather suggested that they were difficulties which would have to be dealt with when they arose. But Mr. Parker took a bolder line in that respect, and said, "Yes, but the instances you have been putting to me are administration instances"; and, in effect, he conceded that full effect was to be given to s. 4 of the special Act in so far as administration was concerned. Then Fletcher Moulton L.J. urged him to go a step farther and admit that this was true, not only in respect of administration, but also in respect of working. But with regard to that I am not quite sure whether Mr. Parker did assent or did not assent or whether he left that appeal unanswered. Be that as it may, it seems to me perfectly manifest that this Act intended not only in respect of administration, but also in respect of working, that these two undertakings should after the date of the amalgamation constitute one undertaking which should be the undertaking of the railway company. I want to say, in dealing with this, that one must not leave out of one's memory what was the condition of the dock company and the railway company respectively at the time of the amalgamation. It must be remembered that in the case of the transfer by the dock company to the railway company of its undertaking and property, there

was included, not only the dock itself, the quays and machinery, hydraulic and otherwise, and the railways and tramways of the dock company, but over and above that a very large quantity of property, some of which was personal property and some of which was in the nature of real property. The dock company, in the administration of its dock, for many years supplied all sorts of things for ships coming into the dock for their convenience, and for this purpose it had shops and factories on the docks. I will take as an example the ice-making factory. The ice-making factory, which clearly passed under this transfer, was as much a part of the dock undertaking as the hydraulic machinery itself. I will pause for a moment at this point to observe that, as I understand the argument of the learned counsel for the appellants, they would say that, notwithstanding this amalgamation, it was impossible for the railway company on its land to do anything for the purpose of more effectively carrying out the undertaking of the dock company, and I think that the particular case that I am going to mention was put to both Mr. Danckwerts and Mr. Parker, and that they both said that according to their view of the undertaking that which was suggested to them would be ultra vires, if done; that is, the building of a bridge across the railway in order to give more convenient access to the dock, which the amalgamated company had to administer and work. I think it is impossible that the Legislature intended—I will put it in two ways—either that no use should be made by the amalgamated company of its land or its property acquired under the railway Acts for the purposes of the railway for the benefit of the dock company, or that the words of s. 4 should be restricted to such an extent that we ought to consider the amalgamation as constituting a simple transfer to the continuing company for the future management of the dock company without in any sense amalgamating the two companies beyond the consequences of that simple transfer. Sect. 4 enacts that thenceforward the two undertakings so amalgamated shall constitute one undertaking, which shall be the undertaking of the company; and I think that we must give full effect to those words, except in so far as an exception is made to full effect being given to them

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either by the provisions of the special Act or by the provisions of the Railways Clauses Act, 1863. I accept, of course, the proposition that it is not true to say that the amalgamated company is entitled to exercise all the powers of either company in consequence of the amalgamation or in consequence of the words of s. 4; but I do say that the words of s. 4 taken by themselves would have had that full operation, and that we must take them as having that full operation except in so far as any part of that full operation is excluded either by s. 7 or any other section of the special Act itself or by the sections of the Railways Clauses Act, 1863. Now I think I have dealt sufficiently in a general way with the intention and operation of the North Eastern Railway (Hull Docks) Act, 1893; and I have shewn that the inferential rights which would naturally accrue from the amalgamation must be taken to have accrued except in so far as they are excluded by the sections to which I have just been referring. I do not believe that in the observations I have been making I have put forward a single proposition which interferes with the recognized rules with regard to statutory corporations, whether railway corporations or otherwise, the first of these rules being that the powers of such a company are strictly limited by what may be found in the statute which creates it; the second being that if a statutory company does anything which is outside the express provisions of the statute creating it then it lies with the statutory company to establish that that which it so does, although not expressly provided for in the Act, is so incidental to that which is expressly authorized by the Act that it must be held by necessary implication to be covered by the express words. Having said that I pass on to deal with this particular case. The railway company here admittedly increased the depth of a well on the land acquired by it under a special Act of 1836, and having increased the depth of that well and the quantity of water to be obtained therefrom, has now by pipes conveyed the water from that well to the dock, and the water so used on the dock company's land is used not only for the working of hydraulic machinery, and for other purposes immediately connected with the maintenance of the dock itself, but also for supplying tenants of houses erected



upon the land acquired by the dock company for the more convenient carrying on of the dock undertaking. In addition to that it is pointed out that the railway company, having got this water from the well, uses it not only for the purposes of the railway locomotives on its lines of railway, but also for certain houses on the railway company's land. As I understand, it is said that the supply of this water, a supply which is paid for by those who get the supply in so far as the houses are concerned, is *ultra vires*. It is said that whether the water was supplied by the railway company to houses on its property or whether it was supplied to houses on the dock company's property it was *ultra vires*. I can only say that so far as I have apprehended the purpose of the supply of water as set out in a schedule which was put in at the trial, and which contained a list of the company's tenants and boat-owners to whom water was supplied at the dock during the quarter ending June 30, 1904, which was after the date of the amalgamation, the whole of this supply was for purposes within the powers of the company. I say the same as I understand it of the water supplied to the tenants of the railway company. But it is said that even if one assumes that in each of the cases I have been dealing with, the railway company or the dock company, as the case may be, would have been entitled if it had a water supply to supply it to these persons on its property for the purpose of carrying on its undertaking, there is nothing in the amalgamation which enables the railway company to use the water in this way for the dock company or for its tenants, and nothing in the provisions of the dock company's Act which would have enabled the dock company if it had a supply of water to use it for the purpose of supplying to the railway company, or to those servants of the company who were living on the railway company's land. Now, before dealing with this question a little more closely, I want to point out one fact that seems to me not without importance, that is to say, regarded in relation to the history of the case. Down to 1903 the Hull Corporation had been furnishing to a large extent the water supplied. Now the mode in which the corporation supplied the water in the case of the dock company was this, that the corporation supplied the water direct to the dock company and it was then distributed by

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the dock company. What was said with regard to that was that although the dock company might have had a perfect right to buy the water from the corporation and to supply it to these houses on the dock company's property it would not have had the power to supply the water itself directly to these houses, and certainly would not have had the power to do so by getting the water from the railway company. I myself do not see that there would have been anything more illegal in the dock company so acting in relation to water provided either by itself or by the railway company than in the case of the supply by the corporation. I now pass to the main question as to the result of the amalgamation. In my judgment such effect ought to be given to the plain words of s. 4 as to justify the amalgamating company utilizing the properties of the dock company and the railway company, both of which have now come to be property to be used in one undertaking, in such a way as would enable the company to do every act which the transfer of the property would enable it to do except those acts which are prohibited either by the express terms of the amalgamating Act, or by the terms of the Act of 1863, or by the terms of the original special Acts. I think that this extension of the water supply from the well dug in the land of the railway company at the Hessle station to objects which were essential to the efficient carrying on of the dock was in no sense illegal or ultra vires, but fell within the powers of the continuing company by virtue of the amalgamation and the transfer of the property, there being nothing to my mind in any Act of Parliament either cutting down the words of s. 4 so far as to prevent the user by the railway company of this land for these purposes or in any way rendering that user illegal or ultra vires. I think, therefore, that this appeal should be dismissed.

ROMER L.J. I also have come to the conclusion that the plaintiffs have not established in this case that what the defendants are doing is ultra vires, and after what my Lord has said I may be comparatively brief. I will first consider the position of the dock company as it stood prior to the amalgamating Act. That dock company's undertaking consisted of two main parts. In the first place there were the docks themselves strictly

so-called. These docks were chiefly, though no doubt not exclusively, used for the purposes of fishing boats. The second part of the undertaking of the dock company consisted of premises whereon there were numerous tenants of the dock company carrying on businesses ancillary to the docks, such for example as fish buyers, fish curers, ice makers for the trawlers and fishing smacks, and so forth. Now the evidence shews that for the efficient working of such an undertaking as that it is essential that there should be an adequate supply of water for all its purposes, that is to say, not only for the purposes of cleansing the quays and so forth, but also for the purposes of the trade tenants whom I have mentioned, and for this further purpose, the supplying of water to ships coming into and using the docks. Now with regard to that undertaking of the dock company, up to the time of the amalgamating Act the necessary water was supplied by the Hull Corporation, but the Hull Corporation had no monopoly of the supply, and the dock company had a perfect right to get water elsewhere if it pleased and if it could do so. I may mention incidentally that in some respects it would be advisable for the dock company to get water elsewhere, if it could do so, because the Hull Corporation were not bound, and would not bind themselves, to provide water for the tenants I have mentioned for trade purposes, or, as I gather, to ships coming into the docks; and, of course, if a drought had occurred, it is possible that the docks might have found themselves short of water. Also, I see by the evidence that the water of the Hull Corporation was hard, and for many purposes of the dock undertaking it is advisable to have softer water. Now in these circumstances it appears to me that if the dock company could have found a provision of suitable water elsewhere—if it could have found better or cheaper water—it would not have been ultra vires of the dock company to have bought such water, and then to have used it for the dock company's purposes, including a supply to the ships coming to the docks, and a supply to the tenants of trade premises forming part of the docks undertaking, and to have supplied such water to those tenants and to the ships at such reasonable rates as the dock company might think sufficiently remunerative. Further, I

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should say that if the dock company found a supply of water on its own premises it would not have been ultra vires of it to have raised that water and to have supplied the water so raised, for the purposes and at the rates I have mentioned. That would not be ultra vires of the dock company, in my opinion, having regard to the nature of the undertaking to which I have called attention. I need scarcely point out that it would not have been the case of the dock company trying to carry on an independent business of water supply or the business of a water company. It would not have been the case of the dock company supplying what I may call outsiders, strangers to the dock company's undertaking. Nor can it be suggested in the case before us that this was a colourable carrying on of a water company's business. There was no supply directly or indirectly through any of the tenants of water to outsiders. Therefore, as I have said, it would not have been ultra vires for the dock company to have acquired this water either from other sources than the Hull Corporation or from its own sources, and to have supplied it in the way in which water is now being supplied by the railway company. I now pass to the position of the railway company since the amalgamation. Under s. 4 of the amalgamating Act, to which attention has been called by my Lord, it is clear that subject to the provisions of the amalgamating Act, in which I include Part V. of the Railways Clauses Act, 1863, the undertaking of the dock company was amalgamated with the undertaking of the railway company, and it was provided that forthwith the two undertakings so amalgamated should constitute one undertaking, which should be the undertaking of the railway company. Now after that amalgamation the railway company had a right, and I should think it even had a duty cast upon it, to work the two undertakings together as economically and as profitably as they could be, considered as one amalgamated undertaking, subject only, as the Act provides, to the special provisions I have mentioned. Now as to those special provisions, after carefully considering them—and we have had the advantage of able arguments upon them—I need only say that I can find nothing in them to justify the conclusion that after the amalgamation the company as owning both the railway and the dock had not the right to use



for the general purposes and advantage of the amalgamated undertaking water which it obtained from land acquired by it as a railway company so long as that was water to which no special restriction attached and no special provisions applied. With regard to the water the subject of this action, there are no such special restrictions and no such special provisions, therefore I do not propose in this judgment to go in detail through the provisions of the amalgamating Act to shew why I have come to that conclusion; but I will say with regard to s. 7, sub-s. (iv.), of the Act in particular, that in my opinion it is not aimed at and does not prohibit the exercise of such a right as that which I have mentioned, any more, for example, than it would prevent the railway company after the amalgamation, if it was proper for the sake of the more economical or efficient working of the amalgamated undertaking, to use railway land for the purpose of manufacturing boilers or other necessary materials for the purpose both of the railway part of the amalgamated undertaking and of the dock part. It follows that so far as the dock undertaking, as a separate thing before the amalgamation, was concerned it would not have been, as I have pointed out, ultra vires on the part of the dock company to have supplied the water in question here, if it could have obtained it, in the way in which it is now being supplied by the railway company, and that so far as the railway company is concerned since the amalgamation it is not ultra vires of it to let the water be used in the way in which it is being used for dock purposes as well as for railway purposes, and on those grounds it appears to me that the judgment of the Court below was right and that the appeal fails.

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FLETCHER MOULTON L.J. The appeal in this case relates to the question whether a company with specific powers defined by statute has acted ultra vires in doing certain specific acts. Prima facie, therefore, it would seem to be a matter affecting only the parties to the case, but in the extremely able arguments which the Court has been privileged to hear on behalf of the appellants there has been developed one question of great general importance and considerable difficulty. The acts complained of

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are acts done by the North Eastern Railway Company in certain docks at Hull which are now their property. The company acquired the docks by an Act passed in the year 1893, at a time when it was a large railway company possessing extensive lands and railways acquired and constructed under previous Acts, and that which is complained of relates to the company's using in their docks water derived from railway land, and therefore impliedly using land which had been acquired under railway Acts for the purposes of the dock. Counsel for the appellants put forward the very tempting argument that the Court will not allow lands acquired by a statutable company for one purpose to be used for another; that these lands were acquired for the purpose of the Hull and Selby Railway and are now being used for the Hull Dock, and that such user is therefore *ultra vires*.

Now it seems to me that in putting forward that argument the counsel for the appellants have confounded two types of cases which are fundamentally distinct. The one is, where the company obtains powers to acquire land for purposes so specific or under such specific limitations that the company is prevented from treating that land as part of the company's general property over which it has the general rights which a company possesses over its property; in other words, the property is earmarked as acquired for specific purposes or for use under special conditions. The other type is, where the property is acquired as the general property of the company, limited in its application as the property of every statutable company must be by the legal purposes of that company but not otherwise. The company of course cannot apply its general property to any purposes beyond those which are the legal purposes of the company at the moment, but if by a subsequent Act those legal purposes are widened, then since they constitute the only limitation of its power over that property its powers are correspondingly widened. But no extension of the general powers of the company can affect the limitations which bind earmarked property, because they bound it when it was acquired; they tied it down within limits more restricted than even the then legal purposes of the company, and that limitation survives any extension of the general purposes of the company. We shall get

a safe guide in distinguishing between these two classes if we think of the revenue of the company. The general revenue of the company can only be applied for the purposes of the company, but who can doubt that when those purposes are statutorily enlarged the purposes for which the revenue can be applied are correspondingly enlarged? If, on the other hand, there is a revenue from some portion of the company's business which is specially appropriated to a particular purpose, no extension of the general purposes of the company can give that revenue a freedom which it did not possess before; and, in my opinion, that which applies to the general revenue applies also to the general property. Such ear-marking is known not only in revenue, not only in landed property, but also in the case of capital. A company may be entitled to raise as part of its general capital a certain sum. No one can doubt that when the purposes of that company are widened that general capital is applicable to the wider purposes. But, on the other hand, it is not uncommon for the Legislature to allow certain sums of capital to be raised for a specific purpose only, and I think no one could doubt that no extension of the general purposes of the company would free that special capital from that limitation.

That being the general principle of law which in my opinion governs these two classes of cases, I turn to the particular case before me. Is the property which is being used property which belongs to the first class or the second? I cannot doubt that as a fact this land, which was acquired for the general purposes of the Hull and Selby Railway, was applicable without any restriction, and was part of the general property of the company, and as the Hull and Selby Railway widened out into the greater network which is now known as the North Eastern Railway, it, step by step, became part of the general property of the enlarged company; and when the last step was taken, and the North Eastern Railway Company became possessed of these docks at Hull, it remained, as it had always been, part of the general property of the North Eastern Railway Company, rightly used for all purposes of that undertaking for which it was suitable since it was fettered by no special limitations. Now what were the general

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purposes of the North Eastern Railway Company after the Act of 1893 had passed? One has only to read the relevant part of the preamble to that Act and the relevant part of s. 4 to see that it was intended that the North Eastern Railway Company should absorb and take into itself the undertaking of the dock company, so as to make it a part of the general undertaking of the railway company. The preamble says: "And whereas it is expedient that the undertakings of the railway company and the dock company should be united, and that those companies should be amalgamated upon the terms and conditions in this Act contained." And s. 4 says: "And thenceforward the two undertakings so amalgamated shall constitute one undertaking which shall be the undertaking of the company." In my opinion this dock undertaking is now as much a part of the undertaking of the North Eastern Railway Company as is the original strip of line, viz., the Hull and Selby line. Of course the learned counsel for the appellants have pointed out special sections in the Act creating the union, which they say qualify this union. I do not think the union is really qualified at all so far as it affects the question before us. It is pointed out that there is a direction that the accounts of the dock company should be kept separate. In my opinion that direction does not raise any doubt that there was intended to be a complete working and administrative union between the two. That the accounts should be kept separate, as the President of the Court has remarked, can be explained on several grounds. Probably it was to preserve evidence which might be available in case the Hull Corporation should think fit to exercise its powers of acquiring the whole of the docks at Hull. Therefore, as I say, I do not think that the existence of this provision in any way militates against the view that the object of the Act was to authorize and create a complete working and administrative union. Then it is suggested that s. 7 limits that complete working and administrative union. In my opinion s. 7 is analogous to the section of the Act of 1863 under which the amalgamation of railways takes place. It provides that the provisions of the several Acts of Parliament (which were drawn up in view of the subject-matter of each as matters then stood, namely, in the one case that it was a railway company and in



the other case that it was a dock company) shall be applicable to the subject-matter with regard to which those Acts were passed. But I cannot see either in s. 7 or in any of the amalgamating sections of the Railways Clauses Act, 1863, any indication that the general powers of a company over the totality of the undertaking should not be as complete after the amalgamation as they were over its original undertaking before the amalgamation. However, the effect of these sections has been dealt with exhaustively by my brethren in their judgments, and I need say no more about them.

I will now pass to that which in my mind has been the real question of difficulty in the present case. I may state it in these words: Admitted that the rights of the North Eastern Railway Company for this purpose are the same as though it had throughout possessed the totality of its present undertaking, are the acts in question beyond what such a statutable company would be legally entitled to do? In deciding this question one must consider what the totality of that undertaking is, because the Court must be guided to a great extent by the nature of the company's work in deciding what are the acts which it is permitted to do. Here we come to a fact which, in my opinion, has a great influence on the decision in this case, and that is that when the amalgamating Act allowed the North Eastern Railway Company to acquire the dock undertaking it not only allowed it to acquire basins full of water and dock gates, but docks completely equipped and including in their enclosures spare lands on which trade buildings had been erected, the presence of which and the intimate connection of which with the docks are necessary for the commercial efficiency of the undertaking. The consequence is that the totality of the undertaking of the North Eastern Railway Company now includes the possession of trade premises used for trade purposes in connection with the working of the docks, and I have no doubt that the company would have a right to put up new trade premises for similar purposes on any land it might hold for the general purposes of the undertaking, and might let those premises when completed. Purposes such as these are purposes which are not generally associated with the powers of a railway company, and

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the consequence is that when we are considering whether this railway company is acting ultra vires we may easily be misled by thinking only of the general cases of railway companies. We must consider whether this railway company, with its complex purposes, is acting ultra vires in supplying this water in the manner complained of. Now I am satisfied that a dock company is perfectly justified in providing as ancillary to its dock undertaking a supply of water which will render the carrying on of that dock independent of disturbing forces from without. Test it in this way. Suppose this dock was a dock such as was the Barry Dock when it was originally planned—a dock at a place where there was no town, and where it might be that the dock would remain isolated. It would be necessary for the carrying on of the dock that there should be an abundant supply of water both for machine purposes and for the purposes of the shipping. Could it be doubted that in such a case the provision and supply of water would be so intimately connected with the carrying on of the dock undertaking that the dock company would be entitled to spend its capital in raising the water and to make a part of its revenue by distributing it? In the present case there are special facts which emphasize this. The water which is supplied by the corporation is unsuitable for boilers, and it is only supplied on the terms on which the corporation gives its ordinary trade supply, under which there is no obligation to continue the supply. That seems to me to emphasize the legitimacy of the action of the railway company in taking care that there should be an independent supply which would render constant and effective the working of its dock undertaking. Taking these as our principles, and looking at the list of the purposes for which the water is actually supplied, I come to the conclusion that all the users are well within the powers of the company. To begin with, a large portion of the water is supplied direct to the dock itself for the purpose of working the hydraulic machines and of washing down the quays and for sanitary purposes; next, a large quantity is used for supplying the ships in the docks, and the rest is used entirely for supplying the company's tenants, who carry on trade in connection with and for the purposes of the trade of the dock. From the specific nature of the supplies

given; I am satisfied that there is no attempt here, under cover of possessing the dock, to turn the railway company into a company for the supply of water otherwise than for dock purposes; and therefore I agree with my brothers that the appellants have failed to make out their case.

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Solicitors: *Sharpe, Parker & Co., for E. Laverack, Hull; R. F. Dunnell.*

H. B. H.

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[1903 E. 1149.]

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*Company—Debentures—Omission to Register—Order for Extension of Time—Proviso protecting Rights acquired prior to Registration—Winding-up after Registration—Unsecured Creditors at Date of Registration—Right to rank pari passu with Debenture-holders registered within the extended Time—Companies Act, 1900 (63 & 64 Vict. c. 48), ss. 14, 15.*

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Where debentures are inadvertently omitted to be registered within the twenty-one days prescribed by the Companies Act, 1900, and are subsequently registered under an order extending the time for registration, and the order contains the usual proviso that it is to be without prejudice to the rights which may have been or may be acquired against the holders of the debentures in question prior to the time when they shall be actually registered, an ordinary unsecured creditor of the company at the date when the debentures are registered is not entitled to rank *pari passu* with such debenture-holders unless he has taken steps to enforce his debt, or unless a winding-up has intervened.

So held by the Court of Appeal, reversing the decision of Joyce J.

*In re Anglo-Oriental Carpet Manufacturing Co., [1903] 1 Ch. 914, approved and distinguished.*

FURTHER consideration of a debenture-holders' action brought by the plaintiff, suing on behalf of himself and all other holders of first mortgage debentures issued by the defendant company.

The defendant company was incorporated under the Companies Acts, 1862 to 1893, on June 26, 1900, and in the same year created a series of first mortgage debentures, all ranking *pari passu* and secured by a floating charge upon the undertaking and all the property of the company present and future, including its uncalled or unpaid share capital.

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The series consisted of 130 debentures for 100*l.* each and one for 50*l.*, and was issued as to part (5800*l.*) before, and as to part (7250*l.*) after January 1, 1901, the date upon which the Companies Act, 1900, came into operation.

The debentures issued after January 1, 1901, were through inadvertence omitted to be registered within the twenty-one days prescribed by s. 14, sub-s. 1, of the Companies Act, 1900, and on July 24, 1903, Swinfen Eady J., under s. 15 of the Act (1), extended the time for registration until August 14, 1903, adding to the order a proviso in the form introduced by the Court of Appeal in the order in *In re I. C. Johnson & Co., Ltd.* (2) The proviso was as follows: "But this order is to be without prejudice to the rights, other than the rights in respect of debentures of the series of the said debentures authorized by resolution of the company dated the 21st day of July, 1900, which may have been or may be acquired against the holders of the said debentures set forth in the said schedule prior to the time when the last-mentioned debentures shall be actually registered."

In pursuance of this order, the debentures issued after January 1, 1901, including the plaintiff's debenture, were duly registered between August 1 and 7, 1903.

On October 15, 1903, the plaintiff issued the writ in this action, and on November 6, 1903, Joyce J., on motion, appointed a receiver.

On November 7, 1903, Gonzalez, Byass & Co., who claimed to be unsecured creditors of the defendant company, served a petition on the company for compulsory winding-up.

(1) Sect. 15 of the Companies Act, 1900, provides as follows: "A judge of the High Court, on being satisfied that the omission to register a mortgage or charge within the time required by this Act, or the omission or misstatement of any particular with respect to any such mortgage or charge, was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of

creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the judge just and expedient, order that the time for registration be extended, or, as the case may be, that the omission or misstatement be rectified."

(2) [1902] 2 Ch. 101, 111.



On November 8, 1903, the defendant company duly passed a resolution for voluntary winding-up.

On December 1, 1903, Buckley J. dismissed the petition of Gonzalez, Byass & Co., the defendant company consenting to Gonzalez, Byass & Co. applying at their own expense in the debenture-holders' action for inquiries as to the priorities of the registered debentures over unsecured creditors on the dates of registration.

On February 18, 1904, the plaintiff, on motion for judgment in default of the defendants in delivering a defence, obtained judgment in this action before Kekewich J., the Court declaring that he and the other holders of the first mortgage debentures issued by the company then outstanding were entitled to a charge upon the undertaking and all the property of the company present and future, including uncalled or unpaid share capital, for securing their principal money and interest; and directing, besides the usual inquiries, an inquiry at what dates respectively the several debentures directed to be registered by the order of July 24, 1903, were in fact registered, and also an inquiry whether any and which of the unsecured creditors of the company at the respective dates of registration aforesaid still remained unsatisfied. The order also gave liberty to Gonzalez, Byass & Co., who appeared by consent on the motion and at whose instance the inquiries above set out were directed, to attend the proceedings on the same inquiries.

On December 12, 1905, the Master made his certificate finding certain persons to have been unsecured creditors on August 1, 1903, and allowing their claims to the extent of 4705*l.* 15*s.* 10*d.*, which still remained unsatisfied. It appeared that the assets were wholly insufficient for payment in full of the debentures and debts.

Gonzalez, Byass & Co., whose claim had been disallowed by the Master, subsequently became the indorsees of certain bills in respect of which a claim had been allowed, and they now, on the further consideration of the action, raised the question whether, having regard to the words of the order of July 24, 1903, those persons who were unsecured creditors at the date of the actual registration of the debentures and were still unsatisfied were not

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*Hughes, K.C., Gore-Browne, K.C., and Edward Ford*, for the plaintiff. The proviso that registration should be without prejudice to the rights of creditors was inserted in orders extending the time for registration of debentures under s. 15 of the Companies Act, 1900, by analogy to the practice under s. 14 of the Bills of Sale Act, 1878, and the principle of *Ex parte Furber*. (1) The object was to protect the rights of absent persons—*In re Joplin Brewery Co.* (2); *In re Spiral Globe, Ltd.* (3); *In re S. Abrahams & Sons* (4)—and was extended by the Court of Appeal in *In re I. C. Johnson & Co., Ltd.* (5), to preserve the rights of debenture-holders *inter se*. In that case the question was discussed whether the words of the proviso preserved only rights as against the company's property obtained by creditors who had taken some proceedings to get a charge or security upon that property, or preserved also the rights of creditors who had not done so, to have their debts paid out of the company's assets. *In re Anglo-Oriental Carpet Manufacturing Co.* (6) is distinguishable, because in that case the resolution for winding-up was previous to the registration. The Act does not give any charge to unsecured creditors, and the proviso in the order does not give them any charge or rights, but leaves the order of charges unaffected. It would be absurd if this were not so, because if an entirely new set of debentures were issued and duly registered before the actual registration of debentures previously issued, but in respect of which an extension of time for registration had been granted, the later debentures would be good against unsecured creditors at the date of registration, whereas the prior debentures, though registered within the extended time, would not be good.

*Badcock, K.C., and Ashton Cross*, for Gonzalez, Byass & Co.

(1) [1893] 2 Q. B. 122.

(2) [1902] 1 Ch. 79.

(3) [1902] 1 Ch. 396.

(4) [1902] 1 Ch. 695.

(5) [1902] 2 Ch. 101, 111.

(6) [1903] 1 Ch. 914.

The unsecured creditors have no claim under the Companies Act, 1900, but only under the proviso in the order. The registered debenture-holders availed themselves of a statutory indulgence, and only obtained leave to register subject to the rights of the unsecured creditors. They have no security as against the unsecured creditors, but come in *pari passu* with them, after the debenture-holders whose debentures were issued before January 1, 1901, have taken the proportion to which they would have been entitled if all the debentures had been good and on an equal footing in this respect.

It is clear that the general result of the proviso in the order made by the Court of Appeal in *In re I. C. Johnson & Co., Ltd.* (1), is to protect unsecured creditors. In the case of *In re Anglo-Oriental Carpet Manufacturing Co.* (2) the winding-up was before the registration, whereas in the present case it was subsequent to it, but Buckley J.'s judgment is equally applicable to either event, and for this purpose the difference between the two cases is immaterial.

*Younger, K.C.*, and *A. E. Austen*, for an unimpeached debenture-holder.

*Hughes, K.C.*, in reply. A debenture-holder who duly registers under an order extending the time under s. 15 ought to be in the same position as if he had originally registered within the twenty-one days prescribed by s. 14, and that would seem to follow from the decision in *In re N. Defries & Co., Ltd.* (3), in which it was held that a company might cancel debentures which had not been registered in time, and issue and register a fresh series which would be good against the liquidator and unsecured creditors. This proviso must refer to rights in the nature of a charge or a security upon the property, and that appears to have been the view taken by Collins M.R. and Cozens-Hardy L.J. in *In re I. C. Johnson & Co., Ltd.* (1) The whole reasoning of the judgment in *In re Anglo-Oriental Carpet Manufacturing Co.* (2) turns on the fact that the winding-up commenced before the actual registration, and *In re Spiral Globe, Ltd.* (4), shews that it is the winding-up that gives the unsecured creditors their right.

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(1) [1902] 2 Ch. 101, 111.

(2) [1903] 1 Ch. 914.

(3) [1904] 1 Ch. 37.

(4) [1902] 1 Ch. 396.

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JOYCE J. This is a question of the meaning and effect of the condition imposed in the order of July 24, 1903, made to enlarge the time for the registration of certain debentures under s. 15 of the Companies Act, 1900. The condition is taken from the now common form set out in the order appended to the report of the case of *In re I. C. Johnson & Co., Ltd.* (1), the terms of which order were settled by the Court of Appeal.

If I were altogether unfettered by authority, I certainly should be disposed to hold that ordinary unsecured creditors did not acquire any rights against the holders of the debentures unless they acquired some right against the property charged by the debentures. But I think it is clear, from the recent case of *In re Anglo-Oriental Carpet Manufacturing Co.* (2), that Buckley J. was of a contrary opinion to that which I would have been disposed to take, and I think that there are indications in the report of the case of *In re I. C. Johnson & Co., Ltd.* (1), that the form of the proviso previously used was altered possibly with a view to the very question which has now arisen, and that the Court intended by some words or other to prevent the registration of debentures, which were strictly speaking out of time, from affecting in any way the position of persons who became creditors before the registration was actually effected.

At the same time I admit that the result is very startling, because, as Mr. Gore-Browne put to me, an entirely new set of debentures, issued and duly registered within the time prescribed by s. 14 of the Act, at or even subsequent to the date of the actual registration of debentures in respect of which an extension of time for registration had been granted under the 15th section, would acquire a good charge against the property and be entitled to be paid before the general creditors. However, I do not see my way to differ from Buckley J. on such a question as this, and I must, therefore, hold that the unsecured creditors and the debenture-holders, whose debentures were not registered within the time prescribed by s. 14 of the Act, come in *pari passu*.

It was suggested that the decision in *In re Anglo-Oriental Carpet Manufacturing Co.* (2) turned on the fact that there had been a resolution for voluntary winding-up before the actual

(1) [1902] 2 Ch. 101, 111.

(2) [1903] 1 Ch. 914.



registration of the debentures. But, on looking carefully into that case, I have come to the conclusion that if Buckley J.'s decision is right, it makes no difference whether the winding-up was before or after the actual registration of the debentures.

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The plaintiff appealed. The appeal came on for hearing on July 25, 1906.

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*Hughes, K.C., Gore-Browne, K.C., and Edward Ford*, for the appellant.

*Badcock, K.C., and Ashton Cross*, for the respondents.

The same arguments were used as in the Court below.

VAUGHAN WILLIAMS L.J. This is an appeal from a decision of Joyce J. The appeal is brought against that part of the order which places the unsecured creditors of the defendant company upon a level with the debenture-holders who registered pursuant to the leave granted under the order dated July 24, 1903, and it is said that the unsecured creditors ought not to have been put upon a level with those debenture-holders. I think that the appellant's contention is right.

It is, of course, necessary to look at the order of July 24, because when one looks at the 14th and 15th sections of the Companies Act, 1900, after the provision in the 14th section for registration within twenty-one days and the provision for the avoidance of such debentures as are not registered within that time, one finds that in the 15th section power is given to a judge of the High Court to extend those twenty-one days, and that section expressly enables the judge who grants the relief in question by extending the time within which the registration may be made to do so upon such terms and conditions as seem to the judge to be just and expedient. I now turn to the order of July 24. [His Lordship read the proviso in the order set out in the statement of facts, and continued:—] That order having been made, the debenture-holders who thus obtained the benefit of it in fact registered the debentures subsequently, and it is not denied that the effect of that registration is that the debentures

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are no longer void, but, being debentures registered within the extended time, are good debentures. But it is said that that is subject to the rights of the persons who were existing unsecured creditors at the time when this order was made. The words that one has to look at are the words “without prejudice to the rights which may have been or may be acquired against the holders of the said debentures”—that is, the debentures which are allowed to be registered out of time—“set forth in the schedule.” Now in my judgment the unsecured creditors who have acquired no rights of property as against the property which is the subject of the debentures do not come within those words. I believe that those words merely intend to protect intervening rights, rights which intervene between the time, the end of the twenty-one days within which the statute requires registration, and the time of registration under the order for extension of the time. One sees, of course, that if there is an order for extension of time, and before the registration actually takes place, there intervenes a winding-up, these words would protect the rights of property so acquired in that interval. But it may also be, besides the acquisition of rights of property in this way, that other rights of property had been acquired by contract or otherwise. I say nothing about such rights of property being excluded from the benefit of this protection. All that I say is that, according to my reading of this order, the protection is given only to those who have acquired rights of property or rights against property, and this, as it seems to me, clearly does not include unsecured creditors who have no right against the property in question and no charge against it. I am now merely dealing with the construction of this particular order. The question is not entirely devoid of authority. First there was a decision of Buckley J., who adopted the form of order which had been adopted in respect of the registration of bills of sale. That was the decision in *In re Joplin Brewery Co.* (1) Subsequently to that decision this matter came before the Court of Appeal, constituted by the Master of the Rolls, Stirling L.J. and Cozens-Hardy L.J., in the case of *In re I. C. Johnson & Co., Ltd.* (2), and the question there was, not what was the protection afforded

(1) [1902] 1 Ch. 79.

(2) [1902] 2 Ch. 101.

to unsecured creditors, but what was the effect of an order drawn in accordance with Buckley J.'s decision in *In re Joplin Brewery Co.* (1) upon the rights of debenture-holders inter se. The Court in that case, of course, had not to decide the question of the rights of unsecured creditors, although I should have gathered rather from the judgments of the learned Lords Justices who were parties to that decision that they would not have affirmed that unsecured creditors who had no rights of property at all and no interest by way of charge or otherwise in the fund of the debenture-holders would have been protected by this order. The result was that the Court of Appeal made the order set out at the end of the report. (2) [His Lordship read the order, and continued:—]

It will be seen that this order does not specifically deal with this question of law how far the words of protection in the proviso in the order would give the unsecured creditors a right to come in *pari passu* with the debenture-holders whose debentures were not registered within the twenty-one days, but were registered pursuant to an order by way of relief and within the time mentioned in that order. We have now to decide that question, but although the order does not in terms deal with that question, it does seem to me that some light is thrown upon the question by the passage at the end of the judgment of Cozens-Hardy L.J. (3): "The analogy of the Bills of Sale Act which Buckley J. took in *In re Joplin Brewery Co.* (1) seems to me to be very close and precise; but, speaking for myself, I doubt whether the words which he has inserted—which are a mere transcript of the common form under the Bills of Sale Act—would have any effect in protecting creditors who had not taken some proceedings to get a charge or a security upon the goods." Of course, that does not mean only creditors who individually have so done, but creditors who come within the operation and benefit of an order for winding-up giving the creditors a right to have such property administered for their benefit. That is the conclusion which I have come to in this case. I think that the intention of the Legislature, as appears by the statute itself, was, in a case where

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(2) [1902] 2 Ch. 111.

(3) [1902] 2 Ch. 110.

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the omission to register was accidental and the extension of time was a just thing to grant, to place the debenture-holders in the same position as they would have been in if they had registered in due time. But of course the Legislature had to make provision for the rights of those who had obtained rights which existed at the time when the order for the extension of time was made. I do not think that the Legislature meant by that that an unsecured creditor, merely because he was an unsecured creditor at the time when the extension order was made, should be allowed to say, "So far as I am concerned, that debenture which was not registered in due time, but which was registered under the order for extension, is a void debenture." In fact, it is not really contended that he can say so. Counsel for the respondents admitted most frankly that in a case, at all events, where debentures are registered under the extension order before a winding-up occurs it is impossible to say that the debenture is void. They only say, "Although it is not void this extension order estops the person registering under it from saying, as against an unsecured creditor, that this debenture is not void, but is an effective security which still continues as against him." I think that is not the right view, and, therefore, I think that this order of Joyce J. must be amended as follows: Strike out so much of it as puts the unsecured creditors who have not got any security upon the property in question on a level with the debenture-holders registering under the extension order.

I think, therefore, that this appeal must be allowed, and allowed with costs.

ROMER L.J. I am of the same opinion. Sect. 14 of the Companies Act, 1900, provides that debentures or any mortgage or charge not filed with the registrar within the twenty-one days there mentioned shall be made void as against the liquidator or any creditor of the company; but the Act does not avoid the mortgage or charge absolutely, but only so far as any security is given thereby upon the company's property or undertaking. The effect, therefore, is that if any mortgage or charge is not registered it is valid as an admission of debt, but as against a



creditor or the liquidator it could not be said that a valid charge was effected thereby. Then comes s. 15. Now that provides for an extension of time within which the registration should be effected in certain given cases, and if you look at the wording of the section it will be seen how carefully the Legislature has provided for the extension of time only being granted in what I may call fit and proper cases, as, for example, where the omission to register was due to inadvertence or some other sufficient cause, or was not of a nature to prejudice the position of creditors or shareholders of the company, or was such that on other grounds it was just and equitable to grant relief. In such cases power is given to the Court to extend the time, and, of course, if the time is extended and registration is made within the extended time, then the debentures would be constituted a valid charge ab initio subject only to such conditions as might be imposed by a judge giving the extended time.

Now when you consider the circumstances under which the Court has power to grant an extension, I think you would naturally expect that the kind of condition the Court would impose would be one to protect any rights that might have been acquired against the property charged in the meantime before the debentures are actually registered, and accordingly one finds that a form has been settled as to the kind of condition which the Court usually imposes in those cases extending the time. The condition in the present case followed the usual form, and provided that the order was to be without prejudice to the rights which might have been or might be acquired against the holders of the debentures before actual registration. Now to my mind the true effect of that condition is that it was only intended to protect rights acquired against or affecting the property charged by the debentures. In my opinion that condition did not mean that after registration the registration was to be of no effect whatever as a charge against all creditors then existing. It appears to me that the very object of the extension of time being granted was to prevent its being said that the debentures were void generally as a charge. After the registration within the time extended it could not have been validly contended that the debentures were to be treated as void as charges generally.

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I think that they were intended to be treated as valid charges subject only, as I have said, to rights acquired which could have been enforced in some way against the property had not the extension of time been granted. The word "right" used in the order means something affecting the debenture-holders as security holders, and something which the Court could recognize and enforce; it cannot mean something—if I may so call it—in the air, some claim or contention which the Court could not recognize or give effect to in any valid proceeding.

Now, in the absence of liquidation before the date of registration or of some charge acquired by a creditor, no ordinary creditor had a right which could have been enforced by him as against the debenture-holders, if the debenture-holders sought to get payment of their charge. The general avoidance of the debentures as charges as against the ordinary creditor prior to liquidation proceedings, and in the absence of any charge acquired by him, would not entitle him to intervene as between the company and the debenture-holders if the company chose to pay the debenture-holders or to apply any part of its property in payment of those debenture-holders or to give other security to the debenture-holders; nor, in my opinion, could such a creditor apply or intervene in an action brought by the debenture-holders against the company where the debenture-holders were seeking to enforce their alleged security if the company chose to recognize the charge and to use its assets in paying those debentures off. An ordinary creditor would have no *locus standi*; if there was liquidation, of course different considerations would apply, and if he had a charge different considerations would apply; he might then intervene, and I think his intervention would be accepted by the Court. But, as I have said, in the absence of liquidation and the absence of something in the nature of a charge acquired upon the security comprised in the debentures, a creditor could not intervene as against any property of the company or as against the debenture-holders in any way whatever. That being so, it appears to me, as I have said, that the only right protected is something which affects the property covered by the debentures.

That disposes of this appeal, and I would only add that, in my

opinion, the decision of Buckley J. in the case of *In re Anglo-Oriental Carpet Manufacturing Co.* (1) was right. In that case the company had gone into liquidation prior to the registration, and a right had been acquired by the creditors which the Court recognized and put in force through the liquidator, saying that all the assets then existing of the company not charged must be applied rateably amongst the then existing creditors. On that ground it appears to me that the decision of Buckley J. was quite right, but for the reasons I have given that decision in no way, to my mind, justifies the order which was made in this case, and therefore, in my opinion, Joyce J. was wrong in thinking that there was any authority which prevented him giving effect to what I gather was his own view as to the effect of the condition in question.

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COZENS-HARDY L.J. I am of the same opinion. Like my brother Romer, I have the satisfaction of feeling that in reversing Joyce J.'s judgment we are really giving effect to that which was his own independent view, though he thought himself bound by two or three decisions of Buckley J. which do not seem to me to bear the construction he put upon them.

Now the question, in my view, depends entirely upon the operation and effect of two or three words inserted in what is now the common form order made by all branches of the Court on applications under s. 15 of the Companies Act, 1900. The question is this, What is the meaning of the words "rights which may have been or may be acquired against the holders of debentures"? In my view that must mean rights acquired against the property of the company or affecting the property of the company intervening between the expiration of the twenty-one days and the extended time allowed by the order. In no other case, it seems to me, can the word "rights" be accurately and properly used. My baker or my butcher cannot be said to have in any proper sense at the time when the debt is incurred any right against my property, although if they hereafter sue me and issue execution or take other proceedings they will then acquire a right against my property. There must be some

(1) [1903] 1 Ch. 914.

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intervening definite act, either by the individual creditor or by some proceedings taken on behalf of the creditors as a body, in order to justify those words "rights acquired." Now is there any authority against that? In my judgment there is not. The first case, and the case which gave rise to this form, was the case decided by Buckley J. of *In re Joplin Brewery Co.* (1) Buckley J. there avowedly followed the analogy of the Bills of Sale Act. He inserted words which, I think, for all material purposes are identical with those which have been inserted for many years past in orders made in the King's Bench Division enlarging the time for registration of bills of sale, and the effect of those words has been clearly interpreted by decisions of the Court, the last of which was *Ex parte Furber*. (2) If that analogy is right, it follows that the only rights protected are those which attach to and affect the property which otherwise would be bound by and affected by the debenture. It is true there are some words in Buckley J.'s judgment which might admit of a wider interpretation of those words, but according to the fair reading of his judgment I do not think that is the true result.

Then there are two subsequent decisions of Buckley J. in *In re S. Abrahams & Sons* (3) and in *In re Anglo-Oriental Carpet Manufacturing Co.* (4) In those cases there had been a winding-up of the company. In one instance it was before the application to enlarge the time, and in the other case it was after the order for the extension of the time had been made, but before the debentures were actually registered; and in both those cases the learned judge held that rights had been acquired by the creditors, not by an individual creditor, but by virtue of proceedings taken which involved the administration of the assets of the company for the benefit of all creditors. The decision in *In re Spiral Globe, Ltd.* (5), is exactly on the same lines, and it seems to me to be perfectly right.

The only other decision to which our attention has been called is the decision of this Court in *In re I. C. Johnson & Co., Ltd.* (6)

(1) [1902] 1 Ch. 79.

(2) [1893] 2 Q. B. 122.

(3) [1902] 1 Ch. 695.

(4) [1903] 1 Ch. 914.

(5) [1902] 1 Ch. 396.

(6) [1902] 2 Ch. 101.



It is quite true that the point which now arises for decision did not arise there, and could not arise. It was an extremely solvent company, and the only question was as to the rights inter se of certain debenture-holders who did not require the aid of the Court and certain others who did require the aid of the Court by enlarging the time for registration. Observations were made in that case by me purely by way of dictum, but as those observations, so far as they were made, have been referred to by Vaughan Williams L.J., and as the matter now arises for decision, I desire to say that I see no reason to qualify what I then said, and I only desire to add that I did not intend to limit my observations to the case of an individual creditor taking proceedings for his own protection, but intended those observations to apply equally to any proceedings taken the effect of which was to involve administration for the benefit of all the creditors of the company.

It seems to me that this appeal ought to be allowed.

Solicitors: *Harris, Chetham & Cohen; Tamplin, Tayler & Joseph; Nordon, De Frece & Drury.*

H. B. H.

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Hinde Palmer's Act, the object of which was only to place specialty and simple contract creditors on an equal footing inter se, in no way deprives an executor of his administrative right to pay his testator's debts in any order he may think fit and to pay a simple contract creditor in priority to a specialty creditor, notwithstanding

**ADMINISTRATION**—*continued.*

that the result may be that the latter may eventually remain pro tanto unpaid.

Decision of Joyce J. reversed.

*In re Hankey*, [1889] 1 Ch. 541, overruled.

*In re SAMSON. ROBBINS v. ALEXANDER*  
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2. — *Personal Estate—Intestacy—Lunatic—Advances to Brothers and Sisters—Stipulation as to Hotchpot—Deceased Sister's Children taking by Representation—Statute of Distribution, 1671 (22 & 23 Car. 2, c. 10), ss. 6, 7.*

A bachelor lunatic died intestate leaving a brother, a sister, and the children of a deceased sister his sole next-of-kin.

The deceased sister had received an advance from the lunatic's property under an order of the Lunacy Court, which order, with her consent, directed that the advance should be taken and considered as part of any share to which she might become entitled in the lunatic's estate at the time of his decease in the event of her surviving him :—

*Held* (affirming the decision of Swinfen Eady J., [1906] 1 Ch. 58), that the deceased sister's children were not bound to bring the advance into hotchpot. *In re GIST. GIST v. TIMBRILL* - - - - C. A. 280

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specified Amount—Death of Annuitant before  
Probate—Right to Value of Annuity.

R. by will directed his trustees, out of the  
proceeds of sale and conversion of his estate,  
after payment of his debts, funeral and testa-  
mentary expenses, to purchase in the name of  
his wife a Government annuity of 400*l.* for her  
life. The wife survived the testator, but died  
within sixteen days before the will was proved  
or any debts paid:—

*Held*, that the annuity, and the right to take  
its value in cash instead of the annual payment,  
vested in the widow on the testator's death, and  
therefore her legal personal representatives were  
entitled to the sum which at the date of the  
testator's death would have purchased the  
annuity *In re ROBBINS. ROBBINS v. LEGGE.*  
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tionment Act, 1870 (33 & 34 Vict. c. 35), s. 2.

The Apportionment Act, 1870, apportioned  
liabilities as well as rights.

*Swansea Bank v. Thomas*, (1879) 4 Ex. D. 94;  
*In re South Kensington Co-operative Stores*, (1881)  
17 Ch. D. 161, 165; *In re Wilson*, (1893) 62  
L. J. (Q.B.) 628, 632; and *In re Howell*, [1895]  
1 Q. B. 844, 847, followed.

The annual sums payable by a bishop in  
commutation of first fruits and tenths are  
“periodical payments in the nature of income”  
within s. 2, and therefore apportionable between  
successive bishops inter se; but, though now  
collected and administered by the Governors of  
Queen Anne's Bounty, they are still in fact  
Crown debts enforceable by writ of extent, and  
therefore not apportionable against the Crown  
or the treasurer of Queen Anne's Bounty.  
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A secured creditor is not entitled to receive payment of his debt from his debtor and to hand over the securities after notice of an act of bankruptcy on the part of the debtor; this is not a limitation of the secured creditor's rights and powers to deal with his securities in any way in which he is entitled to deal with them by virtue of his contract with the debtor, but is only the consequence of the debtor having incapacitated himself from tendering the money.

Decision of Buckley J. reversed.

*In re Lawford and Lawrence*, [1902] 2 K. B. 445, overruled.

Course to be adopted by the Court, in the event of the debtor attempting to enforce his rights by action, or in the event of its aid being invoked to render effective the obligations of third parties towards the debtor or his estate, discussed and stated.

*Semble*, in any event the secured creditor is entitled to his costs of action as well as to interest on the amount due until actual repayment. *PONSFORD, BAKER & Co. v. UNION OF LONDON AND SMITH'S BANK, LIMITED*

C. A. 444

2. — *Undischarged Bankrupt—After-acquired Property—Property vesting in Trustee—Equitable Interest in Freeholds—Intervention of Trustee—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 44, 54.*

A freehold house was conveyed to S., who was in fact a trustee for P., an undischarged bankrupt, after his bankruptcy. A lease for ninety-nine years was expressed to be executed by S. to P. under the alias of R. P. then under the same alias executed a mortgage, by demise,

**BANKRUPTCY**—*continued.*

of the leasehold interest to the defendant for 1750*l.* The money was paid to P., and the whole transaction was bona fide so far as the defendant was concerned. The trustee in bankruptcy had not intervened at the date of the mortgage. He now brought this action for a declaration that he was entitled to the freehold house free and discharged from the lease and the mortgage. It was alleged that the signature of S. to the lease was forged by P., and the Court held that it had not been proved to be the signature of S. The mortgage did not therefore pass any legal estate to the defendant, but it was contended that it gave a good charge upon the bankrupt's equitable interest in the freehold:—

*Held*, that in the present state of the authorities, the proposition laid down in *Cohen v. Mitchell*, (1890) 25 Q. B. D. 262, that, "until the trustee intervenes, all transactions by a bankrupt after his bankruptcy, with any person dealing with him bona fide and for value, in respect of his after-acquired property, are valid against the trustee" must be considered not to apply to real estate, whether equitable or legal, but only to personal estate including leaseholds.

*In re New Land Development Association and Gray*, [1892] 2 Ch. 138; and *In re Clayton and Barclay's Contract*, [1895] 2 Ch. 212, discussed. OFFICIAL RECEIVER (AS TRUSTEE OF PRESTON) v. COOKE - - - - - Neville J. 661

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**BUILDING SCHEME**—Plan—Implied Representation—Power to Vary—Blocking up Road—*Cul-de-sac*—Dedication to Public—User—Right of way.

The plaintiff was the owner of a house built on a plot which formed part of an estate laid out by

**BUILDING SCHEME**—*continued*.

a building society in accordance with a scheme. On the sale of this plot by the society to the plaintiff's predecessor in title it was shewn on a plan of the estate as bounded on one side by a vacant space, which, though not named in the plan as a road, had been in fact roughly made up by the society as a road. This road ran from a street on which the plaintiff's house fronted to a level crossing on a railway over which there was a private right of way for the benefit of the owners of a field on the opposite side of the line. The building society having acquired the field and released the right of way, fenced off the road and sold the site to defendant's predecessor in title. All the plots on the building estate were conveyed subject to a condition reserving to the building society the power of allowing a variation of the plans and conditions. In an action to restrain the defendant from digging up the road on the ground, first, that it was a violation of the building scheme; and, secondly, that the road had been dedicated to the public by user:—

*Held*, that under the conditions the society had an absolute right to alter the building scheme by closing the road, and that there was no sufficient evidence of user or dedication to entitle the plaintiff to succeed.

Decision of Kekewich J., [1906] 1 Ch. 253, affirmed.

*Per* Romer L.J.: It is very difficult to make out dedication by user where the road, so far as the public are concerned, is a cul-de-sac. **WHITEHOUSE v. HUGH** — — — — **C. A. 283**

**BURIAL ACTS**—Ground “not already used as or appropriated for” a Cemetery—Burial within 100 yards of Dwelling-house—Dwelling-houses erected subsequent to Acquisition of Site for Cemetery—“Already”—“Used for Burials”—Injunction—Burial Act, 1855 (18 & 19 Vict. c. 128), s. 9.

The words in s. 9 of the Burial Act, 1855, “no ground not already used as or appropriated for a cemetery” mean, “used as or appropriated” at the date of the passing of the Act, and, consequently, the owner, lessee, or occupier of a dwelling-house which has been erected subsequently to the acquisition of a site for a cemetery by a burial board is entitled to an injunction to restrain any ground within 100 yards of such dwelling-house from being “used for burials” without his consent in writing.

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Affirmed by C. A. - [1906] 2 Ch. 1
- *George Routledge & Sons, Ltd., In re*, [1904] 2 Ch. 474, 480.  
Applied by Swinfen Eady J. *In re* PERTH ELECTRIC TRAMWAYS, LD. [1906] 2 Ch. 216
- *Gibson, In re* - - (1878) 8 Ch. D. 230  
Principle of, applied by Buckley J. *In re* JACKSON & BASSFORD, LD. [1906] 2 Ch. 467
- *Gist, In re, Gist v. Timbrill*, [1906] 1 Ch. 58.  
Affirmed by C. A. - [1906] 2 Ch. 280
- *Goodlad v. Burnett*, (1855) 1 K. & J. 341.  
Applied by Joyce J. *In re* SLATER [1906] 2 Ch. 480
- *Gorringe, In re, Gorringe v. Gorringe*, [1906] 1 Ch. 319.  
Reversed by C. A. - [1906] 2 Ch. 341
- *Green v. Tribe* - (1878) 27 W. R. 39  
Followed by Buckley J. *In re* WHITE-HORNE - - [1906] 2 Ch. 121

## CASES—continued.

- *Hankey, In re* - - [1899] 1 Ch. 541  
Overruled by C. A. *In re* LAWSON, [1906] 2 Ch. 584
- *Harding v. Metropolitan Ry. Co.*, (1872) L. R. 7 Ch. 154.  
Applied by Swinfen Eady J. *In re* CARY-ELWES' CONTRACT [1906] 2 Ch. 143
- *Hauwwell, Ex parte* (1883) 23 Ch. D. 626  
Distinguished by Buckley J. *In re* JACKSON & BASSFORD, LD. [1906] 2 Ch. 467
- *Hendy v. Stephenson* (1808) 10 East, 55  
Not followed by Swinfen Eady J. PALMER v. GUADAGNI [1906] 2 Ch. 494
- *Hereford and South Wales Waggon and Engineering Co., In re*, (1876) 2 Ch. D. 621, 624.  
Dictum of C. A. in, dissented from by C. A. *In re* ENGLISH AND COLONIAL PRODUCE CO. - [1906] 2 Ch. 435
- *Hopkinson v. Rolt* - (1861) 9 H. L. C. 514  
Applied by Kekewich J. HUGHES v. BRITANNIA PERMANENT BENEFIT SOCIETY - - [1906] 2 Ch. 607
- *Howell, In re* - [1895] 1 Q. B. 844, 847  
Followed by Swinfen Eady J. BISHOP OF ROCHESTER v. LE FANU [1906] 2 Ch. 513
- *Hunt's Settled Estates, In re. Bulteel v. Lawdeshayne*, [1905] 2 Ch. 419.  
Affirmed by C. A. - [1906] 2 Ch. 11
- *Jodrell, In re*, (1890) 44 Ch. D. 590; [1891] A. C. 304, 309.  
Applied by Swinfen Eady J. *In re* CORSELLIS - - [1906] 2 Ch. 316
- *Jones, In re* - - (1886) 34 Ch. 65  
Distinguished by Buckley J. *In re* SALVIN - - [1906] 2 Ch. 459
- *Kilner, Ex parte* - (1879) 13 Ch. D. 245  
Principle of, applied by Buckley J. *In re* JACKSON & BASSFORD, LD. [1906] 2 Ch. 467
- *Langmead's Trusts, In re*, (1855) 20 Beav. 20; affirmed on appeal, 7 D. M. & G. 353.  
Principle of, applied by C. A. *In re* BOURNE - - [1906] 2 Ch. 427
- *Lawford and Lawrence, In re*, [1902] 2 K. B. 445.  
Overruled by C. A. PONSFORD BAKER & CO. v. UNION OF LONDON AND SMITH'S BANK, LD. [1906] 2 Ch. 444
- *Levy v. Abercorris Slate and Slab Co.*, (1887) 37 Ch. D. 260, 264.  
Applied by Swinfen Eady J. *In re* PERTH ELECTRIC TRAMWAYS, LD. [1906] 2 Ch. 216
- *Loring v. Thomas*, (1861) 1 Dr. & Sm. 497.  
Discussed by C. A. *In re* GORRINGE [1906] 2 Ch. 341



## CASES—continued.

- *Lowe v. Lowrie*, (1902) 18 Times L. R. 553.  
Observed on by Buckley J. BRADFIELD  
v. CHELTENHAM GUARDIANS  
[1906] 2 Ch. 371
- *Manchester Corporation v. New Moss Col-  
liery, Ltd.*, [1906] 1 Ch. 278  
Reversed by C. A. - [1906] 2 Ch. 564
- *Mason v. Stokes Bay Pier and Ry. Co.*,  
(1862) 32 L. J. (Ch.) 110  
Applied by Swinfen Eady J. *In re*  
CARY-ELWES' CONTRACT  
[1906] 2 Ch. 143
- *Mayhew, In re* - - [1901] 1 Ch. 677  
Distinguished by Buckley J. *In re*  
WESTON'S SETTLEMENT  
[1906] 2 Ch. 620
- *Meinertzen v. Walters*, (1872) L. R. 7 Ch.  
670.  
Applied by Swinfen Eady J. *In re*  
HEATHER - - [1906] 2 Ch. 230
- *Meredith v. Farr*, (1843) 2 Y. & C. C. C.  
525.  
Distinguished by Swinfen Eady J.  
*In re* CORSELLIS, - [1906] 2 Ch. 316
- *Mitchell v. Cantrill* - (1887) 3 Ch. D. 56  
Followed by C. A. FEAR v. MORGAN  
[1906] 2 Ch. 406
- *Montefiore v. Guedalla*, (1859) 1 D. F. & J.  
93, 100.  
Applied by Swinfen Eady J. *In re*  
HEATHER - - [1906] 2 Ch. 230
- *New Land Development Association and*  
*Gray, In re*, [1892] 2 Ch. 138.  
Discussed by Neville J. OFFICIAL  
RECEIVER v. COOKE [1906] 2 Ch. 661
- *North Eastern Marine Engineering Co. v.*  
*Leeds Forge Co.*, [1906] 1 Ch. 324.  
Affirmed by C. A. - [1906] 2 Ch. 498
- *Oldham Corporation v. Bank of England*,  
[1904] 2 Ch. 716.  
Distinguished by Swinfen Eady J.  
*In re* WALLSEND BOROUGH COUNCIL  
AND NORTHUMBERLAND COUNTY  
COUNCIL - - [1906] 2 Ch. 506
- *Oliver's Settlement, In re*, [1905] 1 Ch. 191  
Followed by Buckley J. *In re* WRIGHT  
[1906] 2 Ch. 288
- *Parðoe, In re, McLaughlin v. Penny*,  
[1906] 1 Ch. 265.  
Appeal allowed by C. A. on the facts  
[1906] 2 Ch. 340
- *Pigott and Great Western Ry., In re*, (1881)  
18 Ch. D. 146.  
Applied by Swinfen Eady J.  
[1906] 2 Ch. 143
- *Reg. v. Saunders*, (1854) 24 L. J. (M.C.)  
45.  
Dictum of Erle J. in, applied by Far-  
well J. ATTORNEY-GENERAL v. DE  
WINTON - - [1906] 2 Ch. 106

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- *Regent's Canal Co. v. Wave*, (1857) 23  
Beav. 575.  
Applied by Swinfen Eady J. *In re*  
CARY-ELWES' CONTRACT  
[1906] 2 Ch. 143
- *Regent's Canal Ironworks Co., In re*, (1876)  
3 Ch. D. 43.  
Applied by Swinfen Eady J. *In re*  
PERTH ELECTRIC TRAMWAYS, LD.  
[1906] 2 Ch. 216
- *Robinson's Settlement Trusts, In re*, [1891]  
3 Ch. 129, 133.  
Followed by Swinfen Eady J. *In re*  
FULLERTON'S WILL [1906] 2 Ch. 138
- *Rust v. Victoria Graving Dock Co.*, (1887)  
36 Ch. D. 113.  
Distinguished by C. A. TUNNICLIFFE  
AND HAMPSON, LIMITED v. WEST  
LEIGH COLLIERY CO. [1906] 2 Ch. 22
- *St. Thomas's Dock Co., In re*, (1876) 2 Ch. D.  
116.  
Discussed by C. A. *In re* CRIGGLE-  
STONE COAL COMPANY  
[1906] 2 Ch. 327
- *Sheffield Corporation v. Barclay*, [1905]  
A. C. 292, 399, 403.  
Applied by C. A. ATTORNEY-GENERAL  
v. ODELL - - [1906] 2 Ch. 47
- *Shepherd v. Broome* [1904] A. C. 342  
Referred to by Warrington, J. SHEP-  
HEARD v. BRAY - [1906] 2 Ch. 235
- *Smith v. Southampton Corporation*, [1902]  
2 K. B. 244.  
Followed by Farwell J. ATTORNEY-  
GENERAL v. DE WINTON  
[1906] 2 Ch. 106
- *South Kensington Co-operative Stores, In re*,  
(1881) 17 Ch. D. 161, 165.  
Followed by Swinfen Eady J. BISHOP  
OF ROCHESTER v. LE FANU  
[1906] 2 Ch. 513
- *Spencer's Settled Estates, In re*, [1903]  
1 Ch. 75.  
Distinguished by Swinfen Eady J.  
*In re* SPEARMAN SETTLED ESTATES  
[1906] 2 Ch. 502
- *Strand Music Hall Co., In re*, (1865) 3 D. J.  
& S. 147.  
Applied by Swinfen Eady J. *In re*  
PERTH ELECTRIC TRAMWAYS, LD.  
[1906] 2 Ch. 216
- *Stevens v. Benning*, (1854) 1 K. & J. 168;  
(1855) 6 D. M. & G. 223.  
Followed by Kekewich J. *In re*  
JUDE'S MUSICAL COMPOSITIONS  
[1906] 2 Ch. 595
- *Swansea Bank v. Thomas*, (1879) 4 Ex. D.  
94.  
Followed by Swinfen Eady J. BISHOP  
OF ROCHESTER v. LE FANU  
[1906] 2 Ch. 513



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- *Taber v. Prentice* - (1884) 32 W. R. 872  
Distinguished by Buckley J. *In re*  
WHITEHOUSE - [1906] 2 Ch. 121
- *Tasker (W.) & Sons Ltd., In re*, [1905] 2 Ch.  
587, 598.  
Applied by Swinfen Eady J. *In re*  
PERTH ELECTRIC TRAMWAYS, LD.  
[1906] 2 Ch. 216
- *Torrance v. Bolton*, (1872) L. R. 14 Eq.  
124; 8 Ch. 118.  
Distinguished by Warrington J. *BLAIR-  
BERG v. KEEVES* - [1906] 2 Ch. 175
- *Tunncliffe and Hampson, Ltd. v. West  
Leigh Colliery Co.*, [1905] 2 Ch. 380.  
Reversed by C. A. - [1906] 2 Ch. 22
- *Von Brockdorff v. Malcolm*, (1885) 30 Ch. D.  
172.  
Approved by Joyce J. *In re THOMPSON*  
[1906] 2 Ch. 199
- *Wallinger's Estate, In re*, [1898] 1 I. R.  
139.  
Reasoning of FitzGibbon L.J. in,  
adopted and followed by Buckley J.  
*In re SALVIN* - [1906] 2 Ch. 459
- *Weaton v. Maple & Co.* [1893] 3 Ch. 48  
Discussed by C. A. *FEAR v. MORGAN*  
[1906] 2 Ch. 406
- *Whitchose v. Hugh* [1906] - 1 Ch. 253  
Affirmed by C. A. - [1906] 2 Ch. 283
- *Wilson, In re*, (1893) 62 L. J. Q. B. 628,  
632.  
Followed by Swinfen Eady J. *BISHOP  
OF ROCHESTER v. LE FANU*  
[1906] 2 Ch. 513
- *Wolverhampton and Walsall Ry. Co. v.  
London and North Western Ry. Co.*,  
(1873) L. R. 16 Eq. 433, 439.  
Applied by Swinfen Eady J. *In re*  
CARY-ELWES' CONTRACT  
[1906] 2 Ch. 143
- *Yates v. Yates* - (1860) 28 Beav. 637.  
Followed by Swinfen Eady J. *In re*  
DAWSON - [1906] 2 Ch. 211

**CATALOGUE**—Illustrated—"Book"—"Sheet of  
letterpress— - - - - 491  
*See* COPYRIGHT. 2.

**CEMETERY.**

*See* under BURIAL ACTS.

**CHARITY**—*Bell-ringing in Commemoration of  
the Restoration of the Monarchy—Tombstones for  
Pensioners—Charitable Bequest—"Public chari-  
ties and institutions or charitable purposes for  
the public advantage" to be selected by the Trus-  
tees—Uncertainty—Overriding Charitable  
Intent.*

A testatrix bequeathed—(1.) 200*l.* to the vicar  
and churchwardens of A., the income to be dis-  
tributed annually at Christmas as to the sum of  
1*l.* to the ringers of the church who should ring  
a peal of bells on the anniversary of the restora-  
tion of the monarchy in commemoration of that  
event; (2.) 700*l.* to the vicar and churchwardens

**CHARITY—continued.**

of B., the income to be applied in (among other  
things) the erection and maintenance of head-  
stones to the graves of pensioners in the alms-  
houses at B. who should be buried in the church-  
yard of B. church; (3.) the residue to trustees  
in trust to pay and distribute the same amongst  
"such public charities and institutions or for  
such charitable purposes for the public advan-  
tage" as the trustees should think fit:—

*Held*, that all gifts were effectual charitable  
bequests. *In re PARDOE. MCLAUGHLIN v.  
ATTORNEY-GENERAL* - **Kekewich J. 184**

— Lessor and lessee—Option to purchase  
reversion in fee—Interest in land—Per-  
petuity - - - - - 531  
*See* LESSOR AND LESSEE.

**CLASS**—Gift to children as a class—"Shall die"  
—Words of futurity - - - 341  
*See* WILL. 3.

**COMMISSION**—Principal and agent—Numerous  
transactions—Dishonesty in some—  
Right to retain commission—Accounts  
of profits - - - - - 671  
*See* PRINCIPAL AND AGENT.

**COMPANY**—*Accounts—Balance-sheet—Reserve  
Fund—Secrecy—Information withheld from  
Shareholders—Auditors not to disclose Informa-  
tion—Ultra vires—Companies Act, 1900 (63 & 64  
Vict. c. 48), ss. 21, 22, 23.*

A company under the Companies Acts has no  
power to make regulations precluding its auditors  
from availing themselves of all the information  
to which under the Companies Act, 1900, they  
are entitled as material for the report to be made  
by them to the shareholders as to the true state  
of the company's affairs.

Resolutions were passed by a company to  
alter their articles by inserting a provision that  
the directors might set aside out of profits (with-  
out disclosing the fact) sums to form an internal  
reserve fund; that this fund need not be shewn  
in or disclosed by the balance-sheet, and that no  
information need be given to the shareholders as  
to its amount, investment, or application; that  
the directors might invest it as they thought fit  
without being liable for loss in consequence of  
such investment; that they might apply it for  
any purposes which they considered would ad-  
vance the interests of the company; and that,  
while the particulars as to this fund were to be  
disclosed to the auditors, it was to be the audi-  
tors' duty not to disclose any information with  
regard to it to the shareholders or otherwise:—

*Held*, that these resolutions were ultra vires  
as being inconsistent with the obligations im-  
posed upon auditors by s. 23 of the Companies  
Act, 1900. *NEWTON v. BIRMINGHAM SMALL  
ARMS COMPANY* - - - **Buckley J. 378**

2. — *Costs—Taxation—Preliminary Ex-  
penses—Preparation of Memorandum and  
Articles of Association—Registration Fees—  
Liability of Company.*

A solicitor, on the instructions of persons who  
afterwards joined the board of a company then  
about to be formed, prepared the memorandum

**COMPANY—continued.**

and articles of association of the company and paid the fees of its registration :—

*Held* by Buckley J. and the Court of Appeal, that he was not entitled to recover from the company the costs of the preparation of the memorandum and articles of association ; but

*Held* by Buckley J. (there being no appeal upon this point) that, inasmuch as the company was under a statutory liability to pay the registration fees, he was entitled to recover those fees from the company.

*Per* Vaughan Williams and Romer L.JJ. : The fact that a company adopts and takes the benefit of services rendered under a contract entered into before its formation does not make the company liable in equity to pay for those services.

Dictum of the Court of Appeal in *In re Hereford and South Wales Waggon and Engineering Co.*, (1876) 2 Ch. D. 621, 624, dissented from. *In re* ENGLISH AND COLONIAL PRODUCE COMPANY — — — — — **C. A. 435**

**3. — Debentures—Capital and Income—Payment of Interest out of Capital—Interest on Money borrowed for the Purpose of constructing Works—Period of Construction.**

A tramway company, for the purpose of converting its undertaking to a system of electric traction, issued conversion debenture stock. The directors passed resolutions that the interest on this stock should be treated as part of the cost of construction, and chargeable to capital account during the construction of the works. The memorandum and articles of association of the company contained no provisions relating to this subject :—

*Held*, that there was no general rule of law which compelled companies to charge to revenue account interest on money borrowed for the purpose of constructing works, or prohibited them from charging it, during construction, to capital account ; that in the absence of any provision to the contrary companies were entitled to act in the same way as commercial men dealing honestly in their own business ; and, therefore, that the company were at liberty to charge the interest in question to capital account. *HINDS v. BUENOS AYRES GRAND NATIONAL TRAMWAYS COMPANY, LIMITED*

**Warrington J. 654**

**4. — Debentures—Issue—Deposit of Blank Debenture to Secure Loan.**

A company had power to issue a series of mortgage debentures of 100*l.* each. Each debenture was to be under seal in a certain form, and was to be issued to a holder specified therein and registered. The company had no power to reissue debentures :—

*Held*, that the deposit of an unregistered 100*l.* debenture, sealed in blank without name or date, to secure a temporary loan, was an issue of that debenture, so that it could not be reissued after repayment of the loan.

*Levy v. Abercorris Slate and Slab Co.* (1887) 37 Ch. D. 260, 264 ; *In re Strand Music Hall Co.*, (1865) 3 D. J. & S. 147 ; *In re Regent's Canal Ironworks Co.*, (1876) 3 Ch. D. 43 ; *In re*

**COMPANY—continued.**

*George Routledge & Sons, Ltd.*, [1904] 2 Ch. 474, 480 ; and *In re W. Tasker & Sons, Ltd.*, [1905] 2 Ch. 587, 598, applied.

*In re* PERTH ELECTRIC TRAMWAYS, LIMITED, *LYONS v. TRAMWAYS SYNDICATE, LIMITED, AND PERTH ELECTRIC TRAMWAYS, LIMITED*  
**Swinfen Eady J. 216**

**5. — Debentures—Omission to Register—Order for Extension of Time—Proviso protecting Rights acquired prior to Registration—Winding-up after Registration—Unsecured Creditors at Date of Registration—Right to rank *pari passu* with Debenture-holders registered within the extended Time—Companies Act, 1900 (63 & 64 Vict. c. 48), ss. 14, 15.**

Where debentures are inadvertently omitted to be registered within the twenty-one days prescribed by the Companies Act, 1900, and are subsequently registered under an order extending the time for registration, and the order contains the usual proviso that it is to be without prejudice to the rights which may have been or may be acquired against the holders of the debentures in question prior to the time when they shall be actually registered, an ordinary unsecured creditor of the company at the date when the debentures are registered is not entitled to rank *pari passu* with such debenture-holders unless he has taken steps to enforce his debt, or unless a winding-up has intervened.

So *held* by the Court of Appeal, reversing *Joyce J.*

*In re* Anglo-Oriental Carpet Manufacturing Co., [1903] 1 Ch. 914, approved and distinguished.

*In re* ERHMANN BROTHERS, LIMITED, *ALBERT v. ERHMANN BROTHERS, LIMITED.*  
**C. A. 697**

**6. — Debentures—Registration—Extension of Time—Protection of unsecured Creditors—Practice—Companies Act, 1900 (63 & 64 Vict. c. 48), ss. 14, 15.**

In making an order under s. 15 of the Companies Act, 1900, granting an extension of time for the registration of debentures, the Court will not necessarily impose any terms for the protection of unsecured creditors of the company.

*In re* CARDIFF WORKMEN'S COTTAGE COMPANY, LIMITED — — — **Buckley J. 627**

**7. — Directors—Powers—Postponement of General Meeting.**

The directors of a limited company, in the absence of express authority in the articles of association, have no power to postpone a general meeting of the company properly convened. *SMITH v. PARINGA MINES, LIMITED. PARINGA MINES, LIMITED v. BLAIR. PARINGA MINES, LIMITED v. BOYLE* — — — **Kekewich J. 193**

**8. — Directors — Powers — Vesting of Management in Directors — Resolution by a simple Majority of Shareholders for Sale of Undertaking—Refusal of Directors to comply with Resolution.**

A company had power under its memorandum of association to sell its undertaking to another

**COMPANY**—*continued*.

company having similar objects, and by its articles of association the general management and control of the company were vested in the directors, subject to such regulations as might from time to time be made by extraordinary resolution, and, in particular, the directors were empowered to sell or otherwise deal with any property of the company on such terms as they might think fit. At a general meeting of the company a resolution was passed by a simple majority of the shareholders for the sale of the company's assets on certain terms to a new company formed for the purpose of acquiring them, and directing the directors to carry the sale into effect. The directors, being of opinion that a sale on those terms was not for the benefit of the company, declined to carry the sale into effect:—

*Held* (affirming the decision of Warrington J.), upon the construction of the articles, that the directors could not be compelled to comply with the resolution. **AUTOMATIC SELF-CLEANSING FILTER SYNDICATE COMPANY, LIMITED v. CUNINGHAME** — — — — **C. A. 34**

9. — “*Entitled to commence Business*”—*Non-commencement before Winding-up—Effect on Contracts—Companies Act, 1900* (63 & 64 Vict. c. 48), s. 6.

In s. 6 of the Companies Act, 1900—which provides that “any contract made by a company” (registered after 1900 and inviting the public to subscribe for its shares) “before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding”—the word “provisional” means that the contract is to be read as if it contained a provision that it should not be binding on the company unless and until the company became entitled to commence business.

The section applies to all contracts of a company, whether preliminary or final, or in the course of carrying on its business.

Where, therefore a company had gone into liquidation without having become entitled to commence business, a claim by a person resting on certain alleged contracts with the company, one part of the claim being for moneys paid for furnishing temporary offices for the company, was disallowed. *In re* “OTTO” ELECTRICAL MANUFACTURING COMPANY (1905), LIMITED. **JENKINS’ CLAIM** — — — **Buckley J. 390**

10. — *Powers—Ultra Vires—Railway Company—Dock Company—Amalgamation—Water obtained from Land acquired for Purposes of Railway—Supply to Dock—North Eastern Railway (Hull Docks) Act, 1893* (56 & 57 Vict. c. cxcviii.), ss. 4, 7 (i.), (iv.), 31; *Railways Clauses Act, 1863* (26 & 27 Vict. c. 92), s. 39.

The undertaking of a dock company was amalgamated with that of a railway company by a special Act of Parliament, which provided that the undertakings so amalgamated should constitute one undertaking and be the undertaking of the railway company. The Act further provided that none of the provisions of the Acts

**COMPANY**—*continued*.

relating to the dock company and to the railway company respectively which if the amalgamation had not taken place would apply exclusively to the dock undertaking or to the railway, as the case might be, should apply to any other portion of the undertaking of the continuing company, and Part V. of the Railways Clauses Act, 1863, which was incorporated with the amalgamating Act, contained an analogous provision with regard to the powers of the dissolved company. Before the amalgamation the dock company had been supplied with water by a neighbouring corporation. After the amalgamation the railway company ceased to take water from the corporation, and supplied the dock with water which they obtained from land originally acquired by them for the purposes of their railway. In an action against the company by the Attorney-General at the relation of the corporation:—

*Held*, that the amalgamating Act created a complete working and administrative union of the two undertakings subject to the restrictions contained in that Act and in the Railways Clauses Act, 1863, and that the defendants in supplying water to the dock in the manner complained of were not acting ultra vires.

Decision of Joyce J., [1896] 1 Ch. 310, affirmed.

**ATTORNEY-GENERAL v. NORTH EASTERN RAILWAY COMPANY** — — — **C. A. 675**

11. — *Practice—Reduction of Capital—Paying off Capital in excess of Company’s Wants—Procedure—Companies Act, 1867* (30 & 31 Vict. c. 131), ss. 9, 15—*Companies Act, 1877* (40 & 41 Vict. c. 26), ss. 3, 4.

The provisions of the Companies Acts as to reduction of capital by paying off capital in excess of the wants of the company contemplate that the order of the Court and the registration of the minute stating the reduced capital are to precede any repayment of capital; and they do not contemplate two orders being made on a petition for such reduction, one a preliminary order sanctioning the reduction, and the other an order approving the minute after the reduction has been carried into effect. The minute is intended to shew what the capital will be after the reduction has been carried into effect. There should only be one order sanctioning the reduction and approving the minute.

Form of minute.

*In re Calgary and Edmonton Land Co.*, [1906] 1 Ch. 141, not followed. *In re* LEES BROOK SPINNING COMPANY — **Swinfen Eady J. 394**

12. — *Prospectus—Misstatements—Omissions—Property purchased or acquired—Separate Vendors—“Sub-purchaser”—Non-disclosure—Director—Liability—Companies Act, 1900* (63 & 64 Vict. c. 48), s. 10, sub-s. 1 (f)—*Directors Liability Act, 1890* (53 & 54 Vict. c. 64).

Where a company on its formation purchases or proposes to acquire from an absolute owner property which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, s. 10, sub-s. 1 (f), of the Companies Act, 1900, requires that the name and address of the vendor and the amount



**COMPANY—continued.**

of the consideration shall be stated in the prospectus. There is no obligation under the sub-section to disclose the amount of the purchase-money, however small, paid by the vendor on his acquisition of the property, however recent.

If the company buys merely the benefit of a contract for the purchase of property, the consideration for which remains wholly or partly undischarged, and so, pro tanto, a burden on the property, the company acquiring the benefit of the contract is a "sub-purchaser" within the meaning of the sub-section, and the particulars thereby required must be stated in the prospectus.

A company is not, generally speaking, a "sub-purchaser" for the purposes of the sub-section unless it has to pay purchase-money in some form to some one other than its own vendor, and it is not necessary to state in the prospectus the amount of any consideration paid or to be paid by anyone other than the company.

**BROOKES v. HANSEN - - - Joyce J. 129**

**13. — Prospectus — Untrue Statement — Shareholder's Action against some of the Directors — Compensation paid by Defendants — Contribution from other Directors — Evidence — Liability of Estate of deceased Director — Costs — Directors Liability Act, 1890 (53 & 54 Vict. c. 64), ss. 3, 5 — Rules of the Supreme Court, Order XVI., rr. 48, 54.**

The directors of a company issued a prospectus on the faith of which J. Broome applied for and was allotted shares in the company. The company went into liquidation. Broome brought an action, under s. 3 of the Directors Liability Act, 1890, against three of the directors for compensation on the ground that the prospectus contained an untrue statement. Judgment was given in his favour with costs and an inquiry as to damages directed. The defendants appealed to the Court of Appeal and the House of Lords, but both appeals were dismissed with costs. The case is reported sub nom. *Broome v. Speak*, [1903] 1 Ch. 586, and sub nom. *Shepherd v. Broome*, [1904] A. C. 342. A compromise was arrived at under which the inquiry was dropped, and Broome was paid compensation at the rate of 15s. per share, his taxed costs of the inquiry, and 700l. additional costs. Many other shareholders made claims, which were also compromised, and the three defendants in Broome's action and some of the other directors paid large sums in this way. They did not take advantage of third party procedure, but brought this action against the remaining directors and the executors of three of them, who had died since the prospectus was issued, to enforce, under s. 5 of the Directors Liability Act, 1890, contribution by them of their share of the compensation which had been paid:—

**Held**, that the statement of facts in the report of *Broome v. Speak* ought not to be treated as evidence, but the judgments in that case were an authority for holding on the facts proved in the present action that the prospectus contained an untrue statement.

**Held**, further, that if Broome had brought an

**COMPANY—continued.**

action against all the directors, including those who were now dead, he would have succeeded; that the right to contribution, inasmuch as under the statute it arose as if from contractual relations between the parties, could be enforced against the estates of the deceased directors; and that the defendants must pay, with interest, their share of the compensation and the costs of Broome and other shareholders which had been paid; but that they were not liable to contribute in respect of the costs of the defendants in *Broome v. Speak*, Broome's extra costs, the costs of the appeals, and other payments which had been made otherwise than under the provisions of the Act. **SHEPHEARD v. BRAY Warrington J. 235**

**14. — Reduction of Capital—Paying off Capital in excess of Company's Wants—Practice—Procedure—Companies Act, 1867 (30 & 31 Vict. c. 131), ss. 9, 15—Companies Act, 1877 (40 & 41 Vict. c. 26), ss. 3, 4.**

The provisions of the Companies Acts as to reduction of capital by paying off capital in excess of the wants of the company contemplate that the order of the Court and the registration of the minute stating the reduced capital are to precede any repayment of capital; and they do not contemplate two orders being made on a petition for such reduction, one a preliminary order sanctioning the reduction, and the other an order approving the minute after the reduction has been carried into effect. The minute is intended to shew what the capital will be after the reduction has been carried into effect. There should only be one order sanctioning the reduction and approving the minute.

Form of minute.

*In re Calgary and Edmonton Land Co.*, [1906] 1 Ch. 141, not followed. *In re LEES BROOK SPINNING COMPANY - Swinfen Eady J. 394*

**15. — Winding-up—Creditor's Petition—Assets covered by Debentures—Management of Company controlled by Debenture-holders—Debenture-holders' Action—Rights of unsecured Creditors—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 79, 91.**

A creditor's petition for a winding-up order was opposed by debenture-holders, who had a floating charge on all the property of the company, and who had obtained the appointment of a receiver in an action to enforce their security, and by the company, which was under the control of the debenture-holders, on the ground that there were no assets available for the unsecured creditors:—

**Held**, that the onus was on the respondents to prove that there was no reasonable possibility of any benefit accruing to the unsecured creditors from the winding-up, and that unless that onus was discharged the petitioner was entitled to a winding-up order in order that the unsecured creditors might be represented by the official receiver in the proceedings in the debenture-holders' action.

Decision of Buckley J. affirmed.

*Per Buckley J.*: The Court has jurisdiction to make a winding-up order on a creditor's petition which is not opposed by the unsecured



**COMPANY**—*continued.*

creditors if the order will be useful, not necessarily fruitful, and it is no answer that the debenture-holders will or may sweep up all the assets; and the tendency of the Court since the passing of the Companies (Winding-up) Act, 1890, is not to refuse a winding-up order in such a case on the ground that there are no assets unless it sees that the petition is presented simply for the purpose of making costs.

*In re St. Thomas's Dock Co.*, (1876) 2 Ch. D. 116, and *In re Chapel House Colliery Co.*, (1883) 24 Ch. D. 259, discussed. *In re CRIGGLESTONE COAL COMPANY, LIMITED* — — — **C. A. 327**

**10.** — *Winding-up—Fraudulent Preference—Registered Debenture issued pursuant to antecedent unregistered Agreement—Companies Act, 1862* (25 & 26 Vict. c. 89), s. 164 — *Companies Act, 1900* (63 & 64 Vict. c. 48), s. 14.

A company with a small paid-up share capital was incorporated in March, 1904. It was composed of seven members of the families of J. and B. W. J. was its "permanent director" and the holder of the bulk of its shares, and his son and J. B. were the other directors. The company had a large turnover necessitating more money, and in December, 1904, asked for an overdraft from its bankers. The bank required the guarantee of W. J., and at a meeting of the directors it was resolved that he should be empowered to arrange the overdraft and be requested to secure the same by deposit of securities or otherwise, and that the company should, "whenever called upon by him to do so," give him security over its assets by means of debentures or other charge for the amount for which he should be liable. The overdraft was obtained, and W. J. deposited securities of his own to cover it. In February, 1905, the overdraft was increased, a similar resolution being passed. Neither agreement was registered. On December 8, 1905, W. J. wrote to the company asking for his debenture, and the same day the other directors resolved to give it to him. He received on December 15 a debenture charging all the company's assets with payment of the amount of the overdraft, and this debenture he registered on December 31 under s. 14 of the Companies Act, 1900. On December 29 the directors resolved to call a meeting of the shareholders to pass an extraordinary resolution for voluntary winding-up, and the resolution was passed on January 1, 1906. The company was unable to pay its creditors in full:—

*Held* (applying the principle of *Ex parte Fisher*, (1872) L. R. 7 Ch. 636; *In re Gibson*, (1878) 8 Ch. D. 230; and *Ex parte Kilner*, (1879) 13 Ch. D. 245), that, as the giving of the debenture was purposely postponed until the company was insolvent, in order to preserve the destruction of its credit which would result from registration, the postponement was evidence of an intention to give W. J. a fraudulent preference, and that on that ground the debenture was invalid.

*Ex parte Haweswell*, (1883) 23 Ch. D. 626, distinguished. *In re JACKSON & BASFORD, LIMITED* — — — — **Buckley J. 467**

**COMPENSATION**—Licensing Acts.

*See under LICENSING ACTS.*

**COMPENSATION**—*continued.*

— Mining lease—Waterworks clauses—Capital or income — — — — — **138**  
*See SETTLED LAND. 2.*

— Will—Several persons electing to take against will and taking other benefits under it—Compensation inter se — **321**  
*See ELECTION.*

**COMPOUND SETTLEMENT** — Trustees — Appointment — — — — — **502**  
*See SETTLED LAND. 4.*

**CONDITION** — Patent — Licence — Purchase of patented article from licensee without notice of condition—Estoppel — **443**  
*See PATENT. 3.*

**CONDITIONS OF SALE**—Particulars—Misrepresentation—Property described as freehold — — — — — **175**  
*See VENDOR AND PURCHASER. 1.*

**CONSOLIDATION** — Mortgages — Equities — Express contract—Contrary intention  
*See MORTGAGE. 607*

**CONTRACT**—Company—"Entitled to commence business"—Non-commencement before winding-up—Effect on contracts — **390**  
*See COMPANY. 9.*

— Copyright—Registration—Musical composition — Agreement — Author and publisher — Assignment — Entry on register — — — — — **595**  
*See COPYRIGHT. 3.*

— Lessor and lessee—Contract to convey at time beyond period allowed by rule against perpetuities—Damages — **532**  
*See LESSOR AND LESSEE.*

— Mortgages—Consolidation—Equities—Express contract—Contrary intention  
*See MORTGAGE. 607*

— Privity of contract—Underlessee not an "assign"—No right of action — **631**  
*See LANDLORD AND TENANT. 2.*

**CONTRIBUTION**—Directors' liability—Prospectus—Untrue statement—Shareholder's action against some of the directors  
*See COMPANY. 13. 235*

**CONVEYANCE**—Compulsory powers—Specific performance—Purchasers compelled to take conveyance — — — — — **143**  
*See LANDS CLAUSES ACTS.*

**CONVEYANCING AND LAW OF PROPERTY**—Mortgages—Consolidation—Equities—Express contract—Contrary intention  
*See MORTGAGE. 607*

— Particulars — Misrepresentation—Property described as freehold — — — — — **175**  
*See VENDOR AND PURCHASER. 1.*

**CONVICT**—Administrator—Estate tail—Power to disentail—Forfeiture — — — — — **1**  
*See FELONY.*

**COPYRIGHT**—*Equitable Assignment—Author and Publisher—Story not in Existence—Complete Copyright—Agreement to Assign—“Assigns”—“Employment”—“Any book whatsoever”—Copyright Act, 1842 (5 & 6 Vict. c. 45), ss. 2, 18.*

The plaintiffs, a firm of publishers, agreed with an author to pay him 200*l.* for the complete copyright of a story to be written on the lines of a synopsis already approved by them, containing not less than 80,000 words, copy to be delivered within six months. The story was completed and a typewritten copy delivered to the plaintiffs within the specified time. Pending a dispute about an alleged deficiency in the number of words, the defendants withheld payment of part of the 200*l.*, and in the interval the author sold the volume rights in the story to the defendant, a purchaser for value without notice. The plaintiffs published the story in volume form, and were duly registered as proprietors of the copyright in the book. They now sought to restrain the defendant from publishing the story:—

*Held*, that the agreement constituted a good equitable assignment of the complete copyright in the story, when written, to the plaintiffs, who thereby became “assigns” of the author within the definition contained in s. 2 of the Copyright Act, 1842; and that the plaintiffs were entitled to an injunction, notwithstanding that the case was also a case of employment falling under s. 18 of the Act, under which the plaintiffs could not have succeeded, inasmuch as the story had not as yet been paid for in full by them as required by that section.

The words “any book whatsoever” in s. 18 are not limited to any book ejusdem generis with the books or works previously enumerated, but are to be construed generally as applying to any book to be composed on a bargain between any publisher and any author.

There is nothing in the Act which prohibits the general law concerning the assignment of copyright from being applied to cases which fall within the class of cases contemplated by, and are capable of being determined under, s. 18 of the Act. *WARD, LOCK & Co. v. LONG*

**Kekewich J. 550**

2. — *Illustrated Catalogue—“Book”—“Sheet of letterpress”—Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 2.*

A trade advertisement consisting of a sheet of illustrations with no letters except the name of the advertising firm and the names and prices of the articles, is a “sheet of letterpress” and therefore a “book,” within the meaning of the Copyright Act, 1842, s. 2, and original illustrations on such a sheet would be entitled to protection even in a case where there was no original letterpress. *DAVIS v. BENJAMIN*

**Swinfen Eady J. 491**

3. — *Registration—Musical Composition—Agreement—Author and Publisher—Assignment—Entry on Register—Copyright Act, 1842 (5 & 6 Vict. c. 45), ss. 2, 13.*

In July, 1900, J., who was the registered proprietor of the copyright in a musical composition called “Music and the Higher Life,” entered into

**COPYRIGHT—continued.**

an agreement with N., the managing director of a publishing company, whereby, in consideration of J. giving N. the sole and exclusive right of printing and publishing the series of “Music and the Higher Life” and issuing it in volume form, N. and J. jointly agreed that—(1.) the cost of printing and issuing the volume should be borne by N.; (2) N. should pay J. 6*d.* on every copy sold; (3) N. should supply J. with such copies as he might require at 1*s.* 6*d.* per copy, any copies to be supplied to J. not to be liable to the royalty of 6*d.*

In 1903 the publishing company registered themselves as proprietors of the copyright in two other musical compositions by J., called “The Leidertafel Series” and “The Preacher-Musician Series,” alleging that the copyright belonged to them upon the same terms as that of “Music and the Higher Life.” They also registered themselves as proprietors of the copyright in “Music and the Higher Life (abridged edition),” and asserted that all three registrations were made with the sanction of J. Upon a motion by J., under the Copyright Act, 1842, to expunge these three entries from the registry, on the ground that he had never parted with the copyright:—

*Held* (following *Stevens v. Benning*, (1854) 1 K. & J. 168; (1855) 6 D. M. & G. 223), that the agreement of July, 1900, was a publishing agreement and did not amount to an assignment of the copyright.

*Held*, further, that the registration by the publishing company of these three books was not an entry of an assignment of the copyright within s. 13 of the Copyright Act, 1842.

*In re JUDE’S MUSICAL COMPOSITIONS*

**Kekewich J. 595**

**CORPORATION**—*Borrowing Powers exhausted—Illegal borrowing—Overdraft at Bankers—Interest on Overdraft—Borough Funds—Illegal Payments—Audited Accounts—Borough Treasurer—His Duty and Liability—Certiorari—Injunction—Parties—Local Government—Urban Authority—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 18—21, 25—28, 106, 119, 139—144, 240, Sched. V., Part 1, Sched. VIII.—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 6, 189, 198, 209, 210, 233—237, 245—247, 265.*

A borough which was governed by the Municipal Corporations Act, 1882, and was also an urban authority under the Public Health Act, 1875, had in March, 1903, exhausted all its borrowing powers and had in addition a large fluctuating overdraft at its bankers in respect of expenses previously incurred. The borough kept its banking account in the name of its treasurer, and during 1903 and 1904 the bank charged interest quarterly on the overdraft, and the treasurer in his accounts with the borough debited the borough and credited himself with the charges for interest, and his accounts were audited under ss. 25—28 of the Municipal Corporations Act, 1882, by the borough auditors, who passed the charges for interest, and the audited accounts were submitted to and approved by the borough council. In an action against

**CORPORATION**—*continued.*

the treasurer by the Attorney-General, suing on relation of a burgess, impeaching his accounts in respect of the charges for interest on the overdraft and claiming an injunction to restrain him from making any further payments for such interest out of the borough funds :—

*Held*, that the corporation were not necessary parties to the action, as no relief was asked for against them.

*Held*, also, that the treasurer was not merely the servant of the council, but, as custodian of the borough funds, owed a duty and stood in a fiduciary position to the burgesses as a body, and could not plead the orders of the council for an unlawful act.

Dictum of Erle J. in *Reg. v. Saunders*, (1854) 24 L. J. (M.C.) 45, applied.

*Held*, also (following *Smith v. Southampton Corporation*, [1902] 2 K. B. 244), that the overdraft and the payments of interest thereon were illegal, and that the plaintiffs were entitled to the injunction notwithstanding that the payments might be quashed by certiorari under s. 141, sub-s. 2, of the Municipal Corporations Act, 1882, or by appeal to quarter sessions against the rates.

*Held*, also, that the fact that the defendant's account had been audited under the Act was no bar to the action, there being nothing in the Act which made such audit finally binding and conclusive on the borough and the burgess.

*Held*, also, that the defendant could not retain the charges for interest by way of his remuneration under s. 20 of the Municipal Corporations Act, no remuneration in fact having been voted to him by the council.

Observations on the method of auditing borough accounts under the Municipal Corporations Act, 1882. *ATTORNEY-GENERAL v. DE WINTON* — — — **Farwell J. 106**

**COSTS**—*Numerous Actions against same Defendant*—*Different Plaintiffs*—*Entering Appearance*—*Scale Charge*—*Discretion of Taxing Master*—*Practice*—*Costs*—*Taxation*—*Rules of the Supreme Court*, 1883, *Order LXV.*, rr. 8, 27, *sub-r. 29*; *Appendix N*, Nos. 59, 60.

Where numerous actions were brought by different plaintiffs against one defendant in respect of the same subject-matter, and the defendant's solicitor had entered appearance in all the actions at one and the same time :—

*Held*, that he was entitled on taxation to the full fee allowed by the rules in each action, and that the taxing Master had no jurisdiction under *Order LXV.*, r. 27, *sub-r. 29*, to reduce the fee in respect of all the appearances subsequent to the first. *PRICE v. CLINTON* — — — **Joyce J. 487**

— Bankruptcy—Secured creditor — — — **444**  
*See BANKRUPTCY. 1.*

— Company, Liability of — Preliminary expenses—Registration fees — — — **435**  
*See COMPANY. 2.*

— Director's liability — Prospectus — Untrue statement—Shareholder's action against some of the directors — — — **235**  
*See COMPANY. 13.*

**COVENANT**—After-acquired property clause —  
Persons derivatively entitled — Will —  
Satisfaction — — — — — **222**  
*See WILL. 10.*

— Lease — Good and substantial repair —  
Natural decay — — — — — **166**  
*See LANDLORD AND TENANT. 3.*

— Testator's liabilities — Covenant to pay life annuities—Capital and income — **211**  
*See SETTLED ESTATE.*

— Underlessee not an "assign" — Privy of contract — — — — — **631**  
*See LANDLORD AND TENANT. 2.*

**CREDITOR**—Secured Creditor — Default on Stock Exchange—Mortgage—Deposit of securities—Redemption—Notice of act of bankruptcy — — — — — **444**  
*See BANKRUPTCY. 1.*

**CREDITORS**—Company — Debenture-holders' action—Rights of unsecured creditors  
*See COMPANY. 15.* **327**

— Company — Debentures — Registration —  
Extension of time—Protection of unsecured creditors — — — — — **627**  
*See COMPANY. 6.*

**CUL-DE-SAC**—Dedication to public — User —  
Blocking up road — — — — — **283**  
*See BUILDING SCHEME.*

**CUSTODY**—Title deeds—Deeds shewing title to easement and to extinguishment **640**  
*See VENDOR AND PURCHASER. 3.*

**DAMAGES**—Lessor and lessee—Contract to convey at time beyond period allowed by rule against perpetuities—Charity **532**  
*See LESSOR AND LESSEE.*

— Subsidence—Measure of damages—Risk of future subsidence—Remoteness — **22**  
*See MINE. 1.*

**DATE**—Pleading—Lost grant—Date and parties  
*See PRACTICE.* **494**

**DEATH**—Annuitant before probate, Death of—  
Right to value of Annuity — — — **648**  
*See ANNUITY.*

— Partner—Authority to mortgage partnership assets—Lien of deceased partner's executors—Priorities—Notice — **427**  
*See PARTNERSHIP.*

**DEBENTURES**—Company.  
*See under COMPANY.*

**DEBT**—Specialty — Administration of assets—  
Executor—Preferential payments **584**  
*See ADMINISTRATION. 1.*

**DECAY**—Lease—Lessor's covenant—Good and substantial repair—Natural decay **166**  
*See LANDLORD AND TENANT. 3.*



**DECEASED DIRECTOR**—Liability of estate of—  
Prospectus—Untrue statement - 235  
*See* COMPANY. 13.

**DECLARATION**—Ancient lights—Action for  
declaration that there is no easement  
*See* LIGHT. 1. 544

—Expired patent—Action for declaration of  
invalidity—Mode of procedure - 498  
*See* PATENT. 2.

**DEDICATION**—Cul-de-sac—Dedication to public  
—User—Blocking up road - 283  
*See* BUILDING SCHEME.

**DEEDS**—Custody of title deeds—Deeds shewing  
title to easement and to extinguish-  
ment - - - - - 640  
*See* VENDOR AND PURCHASER. 3.

**DEPOSIT**—Debentures—Issue—Deposit of blank  
debenture to secure loan - - 216  
*See* COMPANY. 4.

**DIRECTORS**—Powers—Postponement of general  
meeting - - - - - 193  
*See* COMPANY. 7.

—Powers—Resolution by a simple majority  
of shareholders for sale of undertaking  
—Refusal of directors - - 34  
*See* COMPANY. 8.

—Prospectus—Misstatements—Omissions—  
Liability - - - - - 129  
*See* COMPANY. 12.

—Prospectus—Untrue statement—Directors'  
liability - - - - - 235  
*See* COMPANY. 13.

**DISCONTINUANCE**—Patent—Action for in-  
fringement—Discontinuance—Terms  
on which allowed - - - 615  
*See* PATENT. 1.

**DISENTAIL**—Convict—Administrator—Estate  
tail—Power to disentail—Forfeiture 1  
*See* FELONY.

**DISENTAILING ASSURANCE**—*Protector of  
Settlement—Legal Estate in Trustees—Void Trust  
for Accumulation—Beneficial Owner—Heir-at-  
Law—Fines and Recoveries Act, 1833 (3 & 4  
Will. 4, c. 74)—Accumulations Act, 1800 (Thel-  
lusson Act) (39 & 40 Geo. 3, c. 98), s. 1.*

A testator who died on April 3, 1854, devised  
real estate to trustees during the lives of three  
persons and the survivor of them upon trust to  
pay certain annuities and accumulate the surplus  
rents and profits and hold them upon the trusts  
therein mentioned during the lives aforesaid.  
And from and after the termination of the estate  
limited to the trustees, the testator devised the  
same to his grandson, John Hughes, in tail. On  
July 14, 1875, John Hughes executed a disen-  
tailing deed in which the only survivor of the  
trustee joined as protector of the settlement.

By an order of the Court dated March 26,  
1879, it was declared that the trust for accumu-  
lation contained in the testator's will was void as

**DISENTAILING ASSURANCE**—*continued.*

from April 3, 1875, the expiration of twenty-one  
years from his death, and from that date the  
surplus rents belonged to his heir-at-law, the  
father of John Hughes.

*Held*, that at the date of the disentailing  
deed there was no protector of the settlement.  
The trustee was not protector, for he had no  
beneficial interest. The beneficial interest  
created by the will had come to an end, and the  
heir-at-law, who was entitled to the beneficial  
interest, did not take under the settlement made  
by the will, and was also prevented from being  
protector by s. 27 of the Fines and Recoveries  
Act, which forbids an heir to be a protector. The  
disentailing deed was therefore valid.

*In re* HUGHES AND LONDON AND NORTH  
WESTERN RAILWAY ACT - Swinfen Eady J. 642

**DISQUALIFICATION**—Guardian of the Poor—  
“Composition or arrangement with  
creditors” - - - - - 371  
*See* POOR LAW.

**DISSOLUTION**—Partnership.  
*See* under PARTNERSHIP.

**DISTRIBUTION, STATUTE OF**—Advances—  
Stipulation as to hotchpot—Deceased  
sister's children taking by representa-  
tion - - - - - 280  
*See* ADMINISTRATION. 2.

**DIVORCE**—Income tax, Deduction of—Separa-  
tion deed—Alimony—Annuity - 358  
*See* REVENUE.

**DOCK COMPANY**—Railway Company—Amalga-  
mation—Water obtained from land  
acquired for purposes of railway—  
Supply to Dock - - - - 675  
*See* COMPANY. 10.

**EASEMENT**—Custody of title deeds—Deeds  
shewing title to easement and to extin-  
guishment - - - - - 640  
*See* VENDOR AND PURCHASER. 3.

—Light.  
*See* under LIGHT.

**ECCLESIASTICAL LAW**—Bishopric—Liabilities  
—Commuted first fruits and tenths 513  
*See* APPORTIONMENT.

**EDUCATION.**  
*See* under SCHOOLS.

**ELECTION**—*Compensation—Several Persons  
electing to take against Will and taking other  
Benefits under it—Compensation inter se—Bene-  
fits received under Will—Compensation received  
included in Benefit.*

B. by his will purported to dispose of property  
comprised in a settlement, under which he took  
a life interest only without any power of dis-  
position, as well as of his own property. Some  
of the persons entitled under the settlement took  
other benefits under the will. They all elected  
to take against the will. This election deprived



**ELECTION**—*continued*.

some of the electing parties of shares in the settled property given to them by the will:—

*Held*, that the persons electing to take against the will were respectively bound to make compensation to other persons so electing, as well as to persons who took under the will only, for any disappointment occasioned by the election to the extent of the benefits received under the will by the several persons electing to take against it.

*Held*, also, that all compensation so paid to any person electing to take against the will must be included in the benefits received by him under the will.

*In re* BOOTH. BOOTH *v.* ROBINSON

Swinfen Eady J. 321

— After-acquired property clause—Persons derivatively entitled—Will—Satisfaction — — — — 222  
See WILL. 10.

— Power—Appointment—Perpetuity — 288  
See SETTLEMENT.

**ELECTRIC LIGHT**—*Local Authority—Electric Lighting—Land acquired under Special Act for Electric Generating Station—Erection of Refuse Destructor on part of Land so acquired—Combined Scheme—Ultra Vires—Injunction—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 175—Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), s. 10—Electric Lighting (Clauses) Act, 1899 (62 & 63 Vict. c. 19), s. 1; Sched., clauses 2, 8.*

A local authority, acting under the powers given to them by a provisional order duly confirmed, which incorporated the Electric Lighting Acts, purchased land by agreement for the purpose of erecting thereon works for generating electricity. Before the purchase they had determined to adopt a scheme, proposed by their engineer, under which they were to erect a refuse destructor on part of the land and use the surplus heat produced by the consumption of refuse in aid of their machinery for generating electricity. The council had power under the Public Health Act to acquire land for the purposes of erecting a refuse destructor:—

*Held*, as a matter of fact, that the council had acquired the land in exercise of their powers under the Electric Lighting Acts, and not under the Public Health Act.

*Held*, also, that the erection and use of the refuse destructor was not ancillary to the supply of electricity, and was therefore ultra vires and must be restrained.

Decision of Farwell J., [1905] 2 Ch. 441, affirmed. ATTORNEY-GENERAL *v.* PONTYPRIDD URBAN DISTRICT COUNCIL — C. A. 257

**EQUITABLE ASSIGNMENT** — Copyright — Author and Publisher—Story not in existence—Complete copyright — 550  
See COPYRIGHT. 1.

**ESTATE TAIL**—Power to disentail—Convict—Administrator—Forfeiture — — 1  
See FELONY.

**ESTOPPEL** — Patent — Licence — Condition — Purchaser's liability to action for infringement — — — — 443  
See PATENT. 3.

**EVIDENCE**—Appropriation—Liability to replace moneys—Statute of Limitations  
See APPROPRIATION. 340

— Directors' liability — Prospectus — Untrue statement — — — — 235  
See COMPANY. 13.

— Will — Construction—Intention—Extrinsic evidence—Admissibility — — 305  
See WILL. 4.

**EXECUTION**—Jointure—Power not yet in existence — Defective execution—Intention — Execution by the Court — — 523  
See JOINTURE.

**EXECUTOR**—Administration of assets — Preferential payments—Specialty debt  
See ADMINISTRATION. 1. 584

**EXPIRED PATENT.**  
See under PATENT.

**EXTINGUISHMENT**—Custody of title deeds—Deeds shewing title to easement and extinguishment — — — — 640  
See VENDOR AND PURCHASER. 3.

**EXTRINSIC EVIDENCE**—Will—Construction—Admissibility—Intention — — 305  
See WILL. 4.

**FELONY**—Convict—Administrator—Estate Tail —Power to disentail—Forfeiture Act, 1870 (33 & 34 Vict. c. 23), ss. 8, 10, 12—"Alienation"—Disposition of Lands entailed—Actual Tenant in Tail —Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), ss. 1, 15, 38, 40.

The Forfeiture Act, 1870, provides that all the real and personal property of a convict shall vest in the administrator appointed under the Act "for all the estate and interest of such convict therein," and that the administrator shall have "absolute power" to sell, convey and transfer any part of such property: by s. 8 the convict, while subject to the operation of the Act, is to be incapable of "alienating" any property:—

*Held* (affirming the decision of Kekewich J., [1906] 1 Ch. 440), that the administrator had no power to bar the estate tail of a convict and convey the fee to a purchaser.

*Held*, also, that a deed by which the convict simply granted the property to a grantee and his heirs to the use of himself, his heirs and assigns, was not an "alienation" within s. 8 of the Forfeiture Act, and consequently that the convict himself could bar his estate tail and thus enable the administrator to sell the fee. *In re* GASKELL AND WALTERS' CONTRACT C. A. 1

**FINANCE ACT**—Compulsory powers — Specific performance—Purchasers compelled to take conveyance — — — — 143  
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**FINES AND RECOVERIES ACT**—"Alienation" —Disposition of lands entailed—Actual tenant in tail — — — — 1  
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**FINES AND RECOVERIES ACT**—*continued.*

— Disentailing assurance—Protector of settlement—Void trust for accumulations  
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**FORFEITURE** — Convict — Administrator — Estate tail—Power to disentail — 1  
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**FRAUD**—Company—Winding up—Fraudulent preference—Registered debenture issued pursuant to antecedent unregistered agreement — — — — 467  
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**FUTURITY**—Words of—Gift to children as a class—"Shall die" — — — 341  
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**GRANT**—Derogation from—Light—Trespass—Party wall — — — — 87  
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— Pleading—Lost grant—Date and parties  
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**GUARDIAN OF THE POOR**—Disqualification for office—"Composition or arrangement with creditors"— — — 371  
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**HOTCHPOT**—Advances—Stipulation as to hotchpot—Deceased sister's children taking by representation — — — 280  
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**ILLEGITIMACY**—Will—Construction—Testator illegitimate — Bequest to "all my nephews and nieces"—Some named  
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**ILLUSTRATED CATALOGUE**—"Book"—"Sheet of letterpress" — — — — 491  
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**IMPROVEMENTS**—Settled land.  
See under **SETTLED LAND.**

**INCOME TAX**—Deduction of—Divorce—Separation Deed—Alimony—Annuity — — 358  
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**INDEMNITY**—Land Transfer Act — — — 47  
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**INFRINGEMENT**—Patent.  
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**INJUNCTION**—Burial Acts.  
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— Electric lighting—Erection of refuse destructor—Ultra vires—Public health  
See **ELECTRIC LIGHT.** 257

— Municipal corporation—Illegal borrowing—Overdraft at bankers — — — 106  
See **CORPORATION.**

**INSURANCE FUND**—Land Transfer Act — 47  
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**INTEREST**—Company — Debentures — Interest on money borrowed for the purpose of constructing works—Period of construction — — — — 654  
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**INTESTACY** — Advances — Stipulation as to hotchpot — Deceased sister's children taking by representation — — 280  
See **ADMINISTRATION.** 2.

**INVESTMENT** — Improper investment within letter of power—Control of Court 11  
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**INVESTMENTS**—Trustee—Nominal debentures issued under Local Loans Act, 1875  
See **TRUSTEE.** 399

**ISSUE**—Debentures—Deposit of blank debenture to secure loan — — — — 216  
See **COMPANY.** 4.

**JOINTURE**—*Power not yet in Existence—Defective Execution—Intention—Execution by the Court.*

T. B. Charlton by his will made in 1882 devised real estate and declared that it should be lawful for every tenant for life thereof to charge it by deed or will with a jointure not exceeding 400*l.* a year in favour of his wife. In 1885 N. J. Charlton, the testator's son, executed a marriage settlement whereby he covenanted to charge all real and personal estate which might come to him from his father with the payment of a jointure of 400*l.* a year to his wife. At the date of the settlement the testator was still alive, and the power to charge had not come into existence. He died in 1886, and N. J. Charlton became tenant for life of his real estate and donee of the power. In June, 1892, a draft deed was settled and approved on behalf of N. J. Charlton whereby he charged the real estate with 400*l.* a year for his wife; but he died a few days afterwards without having executed the deed. His widow claimed a jointure of 400*l.* a year:—

*Held*, that the covenant in the settlement was a defective execution of the power to which, the Court would give effect; that the approval of the draft deed operated as a selection of the property to be charged; and that the widow was entitled to a jointure of 400*l.* a year charged on the real estate devised by the testator. **CHARLTON v. CHARLTON** — **Warrington, J.** 523

**LAMBETH WATERWORKS COMPANY** —  
"Money invested in"—Bequest —  
Transfer of undertaking to Water Board  
— Compensation — — — 480  
See **WILL.** 2.

**LAND TRANSFER** — Mortgage or Charge — Registration—"Registered Proprietor"—Fraud — Forged Transfer—Rectification of Register — Compensation — Indemnity — Insurance Fund — Registrar, Duties of — Request to Register — Implied Warranty of Title—Practice—Indemnity Claim—Hearing before Registrar—Award

**LAND TRANSFER**—*continued.*

—*Appeal from Registrar*—"Applicant"—*Parties*—*Locus Standi*—*Land Transfer Act, 1875* (38 & 39 Vict. c. 87)—*Land Transfer Act, 1897* (60 & 61 Vict. c. 65), s. 7.

O., the registered proprietor under the Land Transfer Acts, 1875 and 1897, of a charge on registered land in Middlesex, purported to transfer the charge by deed for value to O., who thereupon left the transfer at the Land Registry for registration, and he was accordingly registered as proprietor of the charge. It was afterwards discovered that the transfer was a forgery by O.'s solicitor. There had been no negligence on the part of C., and O. was perfectly honest in the transaction. On the discovery of the fraud C. obtained from Kekewich J. an order to rectify the register by removing O.'s name and restoring that of C. O. then applied to the registrar for indemnity under s. 7 of the Land Transfer Act, 1897, and the registrar made an award in his favour, which was confirmed by Kekewich J.

On appeal by the Crown from Kekewich J.'s decision :—

*Held*, that O. was not entitled to indemnity, on the grounds (1.) that upon the principle laid down in *Sheffield Corporation v. Barclay* ([1905] A. C. 392, 399, 402)—a decision of the House of Lords subsequent in date to that of Kekewich J.—O., by bringing the transfer to the registrar and requesting him to register it, had affirmed and warranted it to be a genuine document, and that by that act on his part (although innocent) he had directly brought about the registration of the charge in his name, and so "caused or contributed to the loss," within s. 7, sub-s. 3, of the Act of 1897; and (2.) that O. had not in fact any transfer, under s. 40 of the Act of 1875, from "the registered proprietor of the charge," and consequently had not "suffered loss by the rectification," within s. 7, sub-s. 4, of the Act of 1897.

But, *per* Stirling L.J., *quære*, whether O. did not, by the removal of his name from the register, lose the benefits which are conferred on the registered proprietor for the time being of a charge by ss. 23—27 of the Act of 1875, and thus become entitled to some compensation.

*Per* Vaughan Williams L.J. : The act of the Registrar in putting the name of a transferee of a charge on the register is a mere ministerial act in the performance of a ministerial duty. It confers on the transferee no estate or right which he had not before registration. The utmost it confers on him is the capacity to transfer to a purchaser for valuable consideration unaware of any irregularity in the transaction.

*Per* Cozens-Hardy L.J. : In the case of the registration of the transfer of a charge under s. 40 of the Act of 1875, no person, other than the person first registered, can claim any beneficial right or interest from the mere fact of being on the register unless he can also prove that he has a transfer from some person previously on the register, and in that sense has relied upon the register.

The position, duties and liabilities of the registrar under the Land Transfer Acts considered.

*Per* Kekewich J. : By s. 7, sub-s. 5, of the

**LAND TRANSFER**—*continued.*

Land Transfer Act, 1897, the registrar under that and the principal Act is placed in a judicial position as regards his power to award indemnity to a person suffering loss by a rectification of the register, and is not in the position of a mere arbitrator; and therefore an appeal from his award will lie to the High Court either by the Crown or by the applicant for indemnity.

The registrar being thus in a judicial position, the proper practice appears to be that, upon the hearing of any application to him for indemnity, both the applicant and the Crown should be made parties to the proceedings and be represented before him. ATTORNEY-GENERAL *v.* ODELL — — — — C. A. 47

**LANDLORD AND TENANT**—*Derogation from Grant*—*Light*—*Trespass*—*Party Wall*—*User of External Wall as Party Wall*—*Architect*—*Scope of Authority*—*London Building Act, 1894* (57 & 58 Vict. c. ccviii.). s. 5, sub-ss. 15, 16; s. 59, sub-s. 1.

The plaintiffs were lessees from the defendants of a plot of land which at the date of the lease was partially covered with buildings and was occupied by the defendants together with the adjoining property as business premises, and the lease contained a covenant by the plaintiffs to build on the demised land a warehouse according to approved plans which shewed that the back wall of the warehouse was to contain certain windows on the first floor overlooking the defendant's premises. The defendants, in pursuance of a collateral agreement to clear the demised land of buildings, demolished one end of a cart shed which stood partly on the demised land and partly on the land reserved by the defendants, but they left remaining certain stanchions and roof beams, which slightly projected over the plaintiffs' boundary and which were eventually built into the back wall of the warehouse under a verbal agreement between the plaintiffs' architect and the defendants. The architect was employed to superintend the building of the warehouse in accordance with the approved plans, and the agreement was made without the express authority or knowledge of the plaintiffs. The wall was built entirely on the demised land. Subsequently the plaintiffs were called upon by the local authority to block up the windows in the back wall on the ground that the building in of the stanchions and roof beams had converted it into a party wall within the meaning of the London Building Act, 1894. In an action for an injunction to restrain the defendants from using this wall as a party wall :—

*Held*, that during the continuance of the lease the plaintiffs were entitled by implied grant as against the defendants to an unqualified right to the excess of light coming through the windows in question; that the agreement was beyond the scope of the architect's authority; and that the user of the wall by the defendants as a party wall constituted a derogation from their grant and a trespass; and the defendants were ordered to disconnect their buildings from the wall. FREDERICK BETTS, LIMITED *v.* PICKFORDS, LIMITED — — — — Kekewich J. 87



**LANDLORD AND TENANT—continued.**

2. — *Rates, Covenant by Landlord to pay—Covenant with Lessee, "his executors, administrators and assigns"*—*Underlease—Merger of Reversions—Benefit of Covenant—Privity of Contract—Right in Equity—Underlease not an "Assign"—No right of Action.*

An underlessee is not entitled to sue the assign of the freehold and leasehold reversions in the premises comprised in his underlease in respect of a positive covenant by the ground landlord with the original lessee, where the latter has not assigned or demised the benefit of such covenant to, or entered into a similar covenant with, the underlessee.

On the demise of part of a freehold house the lessee covenanted to pay one-third of the water rate payable in respect of the house, and the lessor covenanted to pay all rates and taxes except the water rate to the extent covenanted to be paid by the lessee. The lessee subdemised to the plaintiffs, who, with knowledge of the superior lease, covenanted to pay one-third of the water rate payable in respect of the house. Subsequently the freehold reversion and the superior lease became vested in the defendant, who, the local authority having separately assessed the part comprised in the lease and underlease, refused to pay any of the rates and taxes in respect of such part. The local authority distrained, and the plaintiffs sought to recover from the defendant the amount which they had been compelled to pay :—

*Held*, that the action must fail, there being no privity between the parties or any principle of equity upon which the plaintiffs were entitled to succeed.

An underlessee is not an "assign" of his lessor (the original lessee) so as to be entitled to the benefit of a positive covenant entered into with the latter, "his executors, administrators and assigns," by the ground landlord in the original lease. *SOUTH OF ENGLAND DAIRIES, LIMITED v. BAKER* — — — *Joyce J. 631*

3. — *Repair—Lease—Lessor's Covenant—Construction—Good and substantial Repair—Old Building—Natural Decay—Extent of Obligation.*

A covenant by a lessor to keep the outside walls of the demised premises in repair will be construed as a covenant to repair on notice, and there can be no breach of such a covenant until the lessor has notice of want of repair.

The principles of construction which have been applied to lessee's covenants to repair apply equally to similar covenants by lessors. Regard must be had to the age and condition of the buildings to which the covenant refers. A lessor is not bound by such a covenant to rebuild during the term of the lease premises which have at the date at which he receives notice become worn out by age, and, merely from the action of time on the materials used, been reduced to a state in which repair is impossible.

In 1890 the three upper storeys of a house in London were demised to the lessee for a term of eighteen years from March 25, 1890, at a rent of 150*l.* The lessor covenanted to keep the outside of the demised premises in good and substantial

**LANDLORD AND TENANT—continued.**

repair. The lessee covenanted to keep the inside in repair, to permit the lessor to enter and view the state of repair, and to use the premises for the business of a private hotel-keeper. In 1905 the plaintiff was the assignee of this lease and the defendant was the owner of the reversion. On July 13, 1905, the London County Council served on the premises a notice requiring the owner to take down the front and back walls of the house as being dangerous structures. The plaintiff at once communicated this notice to the defendant and required him to repair the walls. The defendant did nothing, and the London County Council themselves took down the walls from the first floor upwards, propped up the floor with timber, and left the place uninhabitable.

The plaintiff brought this action against the defendant for breach of the covenant to keep the outside in repair. The defendant had no notice before July 13, 1905, of any want of repair. At that date the house, which was about 200 years old, had by the natural effect of time become so worn out and decayed that it was impossible to repair it except by taking it down and rebuilding :—

*Held*, that there had been no breach of the lessor's covenant to repair. *TORRENS v. WALKER* — — — *Warrington J. 166*

— Light—Prescription—Dominant and servient tenements held under common landlord — — — — — **406**  
*See LIGHT.*

**LANDS CLAUSES ACT—Compulsory Powers—Specific Performance—Notice to Treat—Award—Vendor's Action—Purchasers compelled to take Conveyance—Form of Conveyance—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 75, 81, 82—Finance Act, 1895 (58 & 59 Vict. c. 16), s. 12.**

A public body acquired certain lands and certain easements over other lands of the vendor, a life tenant of settled estates, under the compulsory powers of a special Act, incorporating the Lands Clauses Consolidation Act, 1845, but not vesting the property. The proceedings were by notice to treat, arbitration and award, and there was no question as to the vendor's title.

The public body paid the purchase-money into Court and took possession, but refused to take a conveyance on the ground of expense. There was nothing in the special Act to justify this position :—

*Held*, that both under the ordinary law of specific performance and under the Finance Act, 1895, s. 12, the public body were bound to take a conveyance, and that this conveyance must be settled by the Court in case the parties differed.

*Adams v. London and Blackwall Ry. Co.*, (1850) 2 Mac. & G. 118; *Regent's Canal Co. v. Ware*, (1857) 23 Beav. 575; *In re Pigott and Great Western Ry. Co.*, (1881) 18 Ch. D. 146; *Mason v. Stokes Bay Pier and Ry. Co.*, (1862) 32 L. J. (Ch.) 110; *Harding v. Metropolitan Ry. Co.*, (1872) L. R. 7 Ch. 154; and *Wolverhampton and Walsall Ry. Co. v. London*



**LANDS CLAUSES ACT—continued.**

and *North Western Ry. Co.*, (1873) L. R. 16 Eq. 433, 439, applied.

*In re CARY-ELWES' CONTRACT*

**Swinfen Eady J. 143**

**LEASE**—Mining—Compensation—Waterworks—Capital or income - - - **138**

See **SETTLED LAND. 2.**

**LEASEHOLDS**—Licensing Acts—Compensation Mortgagor and Mortgagee—Parties interested. - - - **98**  
See **LICENSING ACTS.**

**LEGACY**

See under **WILL.**

**LESSOR AND LESSEE**—Option to Purchase Reversion in Fee—Interest in Land—Perpetuity—Contract to convey at Time beyond Period by Rule against Perpetuities—Remoteness—Damages for Breach of Contract—Charity.

In 1878 land was demised to the plaintiffs' predecessors for thirty years from September 29, 1876, to be used as a public park; and the lease contained a proviso that at any time during the term the lessor, her heirs or assigns, would, on receiving notice from the plaintiffs of their desire to purchase the land, convey it to them for 1235*l.* The lessor died in 1902. In 1905 the plaintiffs served on her devisees notice of their desire to purchase. The devisees maintained that the option was void as infringing the rule against perpetuities; and the corporation brought this action against them and the lessor's executor for specific performance of the contract to sell, or in the alternative, damages for breach of contract:—

*Held*, that the option to purchase was void for remoteness, and could not be enforced by specific performance; that this defect was not cured by the fact that the option was given for charitable purposes, inasmuch as the interest of the charity did not become effective till the happening of the future event, but that the plaintiffs were entitled to recover damages from the defendants for breach of covenant to convey. **WORTHING CORPORATION v. HEATHER**

**Warrington J. 532**

**LICENCE**—Patent—Condition—Estoppel—Purchaser's Liability to action for infringement - - - **443**  
See **PATENT. 3.**

**LICENSING ACTS**—Compensation—Refusal to Renew Licence—Mortgagor and Mortgagee—Trust Deed—Leaseholds—Parties interested—Licensing Act, 1904 (4 *Edw. 7, c. 23*), s. 2.

Where a company has specifically mortgaged leaseholds to trustees to secure debenture stock, trustees will be entitled to receive the compensation money awarded to the company under the Licensing Act, 1904, in respect of the refusal of the licensing authority to renew the licence of a leasehold beer-house included in the security; but the mortgagors, being in possession, will be entitled to the interest received in respect of the investment of such compensation money, until

**LICENSING ACTS—continued.**

the security becomes enforceable. **LAW GUARANTEE AND TRUST SOCIETY, LIMITED v. MITCHAM AND CHAM BREWERY COMPANY, LIMITED** - - - **Kekewich J. 98**

**LIEN**—Partner, Death of—Authority to mortgage partnership assets—Lien of deceased partner's executors - - **427**  
See **PARTNERSHIP.**

**LIGHT**—Ancient Lights—Easement—Alteration of Dominant Tenement—Increased Burden on Servient Tenement—Destruction of Easement—Action for Declaration that there is no Easement.

The plaintiffs were the owners of a piece of land adjoining the defendant's premises. The latter consisted of a house with a backyard open to the sky. In the house there were on the ground floor two ancient lights looking into the yard. At the other end of the yard was a shed which derived light from the yard, to which one of its sides was open, and from an ancient light looking on to the plaintiffs' land. The defendant pulled down his house and rebuilt it, preserving the ancient lights. He raised the wall between his yard and the plaintiffs' land, and left in it the window to the shed and two apertures to give light to the yard. He covered in the yard so as entirely to shut out all light except that which came through the apertures. He pulled down hoardings which the plaintiffs had erected to close the apertures and the shed window, and they brought this action against him for a declaration that he was not entitled to any easement over their land for light and air:—

*Held*, that the defendant had increased the burden on the plaintiffs' land; it was impossible to sever the burden and say that he was still entitled to impose on the plaintiffs' land the burden which had previously existed; he could no longer maintain an action against the plaintiffs for interference with his ancient lights; he had no right which could be enforced; and therefore that the plaintiffs were entitled to the declaration they claimed. **ANKERSON v. CONNELLY** - - - **Warrington J. 544**

**2. — Prescription—Dominant and Servient Tenements held under common Landlord—Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 3.**

Under s. 3 of the Prescription Act, 1832, where two adjoining tenements are held by different lessees under a common landlord and one lessee has enjoyed the access and use of light in respect of his tenement over the other tenement for a period of twenty years without interruption, he acquires an absolute and indefeasible right to light as against that other tenement, and this right enures in favour of that lessee and his successors, not only as against the adjoining lessee, but as against the common landlord and all succeeding owners of the adjoining tenement:—

So held by the Court of Appeal, affirming **Kekewich J.**

*Frewen v. Philipps*, (1861) 11 C. B. (N.S.) 449, and *Mitchell v. Cantrill*, (1887) 37 Ch. D.

**LIGHT**—*continued.*

56, which establish this proposition, are recognized as authorities by the Court of Appeal in *Wheaton v. Maple & Co.*, [1893] 3 Ch. 48, and are not impliedly overruled by *Colls v. Home and Colonial Stores, Ltd.*, [1904] A. C. 179.  
**FEAR v. MORGAN** — — — — **C. A. 406**

— Derogation from grant—Trespass—Party wall—London building — — — **87**  
*See LANDLORD AND TENANT. 1.*

— Electric light  
*See under ELECTRIC LIGHT.*

**LIMITATIONS, STATUTE OF**—*Part Payment—Solicitor's Bill—Recovery of Moneys due to Client—Retainer on account with Assent of Client.*

A solicitor brought in a claim for costs against a deceased client's estate which was being administered by the Court. Most of the costs were incurred more than six years before the judgment in the administration action. The solicitor, who had acted for the client in various matters for many years, during the whole of which period the client was heavily indebted to him, on several occasions recovered moneys for the client and made certain payments thereon on the client's behalf and, with the assent of the client, retained the balance on account of the client's indebtedness to him. On another occasion he received from an interested party a contribution to the costs of an action which formed the principal item of the claim and, with the assent of the client, placed the sum so received to the credit of the client's account:—

*Held*, that these transactions did not constitute part payments so as to take out of the operation of the Statute of Limitations the items which were barred at the date of the judgment.

Whether, when a payment on account is made by the debtor and there has been no appropriation by either the debtor or the creditor, the law will appropriate it to the earliest of the items which at the date of the payment were statute barred, or will treat it as attributable *pari passu* to all such items so as to take them out of the operation of the statute, *quære*. *In re BOSWELL. MERRITT v. BOSWELL.*

**Kekewich J. 359**

— Appropriation—Liability to replace moneys Evidence — — — — **340**  
*See APPROPRIATION.*

**LOAN**—Debentures—Issue—Deposit of blank debenture to secure loan — — — **216**  
*See COMPANY. 4.*

**LOCAL AUTHORITY**—Electric lighting.  
*See under ELECTRIC LIGHT.*

**LOCAL GOVERNMENT**—Borrowing powers exhausted—Illegal borrowing—Overdraft at bankers — — — — **106**  
*See CORPORATION.*

— Guardian of the poor—Disqualification for office—"Composition or arrangement with creditors" — — — — **371**  
*See POOR LAW.*

**LOCAL LOANS**—Trustee—Investments—Nominal debentures issued under Local Loans Act, 1875 — — — — **399**  
*See TRUSTEE.*

**LONDON**—Party wall, User of external wall as—Architect—Scope of authority — — **87**  
*See LANDLORD AND TENANT. 1.*

**LOST GRANT**—Pleading—Date and parties **494**  
*See PRACTICE.*

**LUNACY**—*Person not detained as or found of Unsound Mind, but incapable of managing his Affairs—Order for Payment of Debt in Priority—Subsequent Death of Debtor and Administration of his Estate in High Court—Effect of Lunacy Order—Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 116, 117.*

H. was a person not detained as or found lunatic, but found to be incapable of managing his affairs through mental infirmity arising from disease.

In 1898 a Master in lunacy made an order under s. 116 of the Lunacy Act, 1890, that H.'s wife should be authorized to do such things as the Masters should approve of for the purpose of protecting his estate and to exercise the powers of a committee of his estate.

In 1902 an order was made in lunacy that H.'s wife should apply certain funds in payment to his creditors of a dividend of 6*d.* in the pound on their debts.

In 1904 an order was made in lunacy that B. & Co., who had not previously claimed, should be admitted as creditors in respect of a certain debt, and should participate in future dividends out of H.'s estate, and should rank in priority to other creditors to the extent of 6*d.* in the pound upon that debt.

Before effect could be given to the order of 1904 H. died, and proceedings for the administration of his estate were taken in the Chancery Division of the High Court:—

*Held*, that the jurisdiction in lunacy ended at the death of H.; that the order of 1904 did not bind the High Court when administering his estate; that on the death of H. his creditors were entitled to have his assets collected and distributed according to their rights as creditors on the estate of a deceased person irrespective of the fact that up to his death his estate was subject to the jurisdiction in lunacy; and that the claim of B. & Co. to priority therefore failed. *In re SEAGER HUNT. SILICATE PAINT COMPANY AND J. B. ORR & Co. v. HUNT*

**Buckley J. 295**

— Advances—Stipulation as to hotchpot—Deceased sister's children taking by representation — — — — **280**  
*See ADMINISTRATION. 2.*

**MAINS**—Tramways—Protection of mains—Notice by promoters to owner of mains of intention to construct tramway—Limit of time for giving counter-notice — — — — **578**  
*See TRAMWAYS.*

**MEETING**—Directors—Powers—Postponement of general meeting - - - 193  
See COMPANY. 7.

**MEMORANDUM AND ARTICLES OF ASSOCIATION**—Company.  
See under COMPANY.

**MERGER**—Reversions—Benefit of covenant—Privy of contract—Underlessee not an "assign" - - - 631  
See LANDLORD AND TENANT. 2.

**METROPOLITAN WATER STOCK**—Bequest—"Money invested in" Lambeth Waterworks Company—Transfer of undertaking to Water Board—Compensation  
See WILL. 2. 480

**MINE**—*Subsidence—Measure of Damages—Risk of future Subsidence—Remoteness.*

In assessing the damages recoverable by a surface owner for subsidence owing to the working of minerals under and adjoining his property, the Court will take into account the depreciation in the market value of the property attributable to the risk of future subsidence.

So held by the Court of Appeal (Romer L.J. dissentiente).

Decision of Swinfen Eady J., [1905] 2 Ch. 390, reversed.

*Rust v. Victoria Graving Dock Co.*, (1887) 36 Ch. D. 113, distinguished.

TUNNICLIFFE & HAMPSON, LIMITED *v.* WEST LEIGH COLLIERY COMPANY, LIMITED

C. A. 22

2. — *Waterworks—Reservoir—Lands purchased by Agreement for the Purposes of Waterworks—Mines and Minerals purchased together with Lands—Right to Support from Minerals under adjacent Land—Limit of Forty Yards—Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 18—27.*

Where land is acquired by agreement for the purposes of constructing waterworks under a special Act which incorporates the Waterworks Clauses Act, 1847, and the undertakers purchase all the mines and minerals under the land so taken, they acquire all the rights of support from the minerals under adjacent lands which the vendor had at common law at the time the land was taken. In such a case ss. 18 to 27 of the Waterworks Clauses Act do not take away the common law right of support from minerals under adjacent lands, or give the owners of such minerals any greater right to work them so as to let down the surface of the land taken, as against the undertakers, than they had against the vendor before the land was taken.

In such a case, and *semble* in all cases, these sections have no reference to lands outside the limit of forty yards, or other limit prescribed by the special Act. The rights of the undertakers and the owners of such minerals in relation to their working are governed by the common law.

In 1875 a corporation purchased land from S., and adjoining land from T., for the purpose of constructing a reservoir in connection with their waterworks. At the date of the conveyance the corporation had power to purchase

**MINE**—*continued.*

land by agreement for the purposes of their waterworks generally under various Acts, but the compulsory powers originally given by those Acts did not apply to the lands in question, and had lapsed. An Act empowering the corporation to construct the reservoir for the purposes of which the land was bought was passed after the conveyances. The conveyance from S. reserved the minerals with power to work without making compensation for injury to the surface. The conveyance from T. included all minerals and all his right and interest in the land. The reservoir was constructed partly on S. lands and partly on T. lands. The defendants, who were lessees from S. of the minerals under the lands sold by him to the corporation and other lands, gave notice to the corporation of their intention to work the coal adjacent to and under the lands bought from S. The corporation gave no counter-notice of their willingness to pay compensation. The defendants continued their workings, and caused subsidence of the land bought from T. This was in part caused by workings more than forty yards from the land injured. The corporation brought this action to restrain the defendants from working so as to let down the surface:—

*Held*, that the corporation, having bought T.'s land with the minerals, had acquired the same common law right to support from the minerals under adjacent lands as T. had enjoyed; and that there was nothing in the Waterworks Clauses Act to take this right away. Injunction granted.

Decision of Farwell J., [1906] 1 Ch. 278, reversed.

MANCHESTER CORPORATION *v.* NEW MOSS COLLIERY, LIMITED - - - C. A. 564

**MINING LEASE**—Waterworks clauses—Compensation—Capital or income - 138  
See SETTLED LAND. 2.

**MISREPRESENTATION**—Particulars—Property described as freehold - - - 175  
See VENDOR AND PURCHASER. 1.

**MORTGAGE**—*Consolidation—Equities—Express Contract—Contrary Intention—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 17.*

A mortgage to the defendants of leasehold property, M., contained a provision that the mortgagor should not be entitled to redeem without first paying all moneys that might be secured to the mortgagees by any other mortgage executed by the mortgagor. The mortgagor then mortgaged another leasehold, R., to the defendants, and the day after gave a second mortgage of it to the plaintiffs. Of this mortgage the defendants had notice. He subsequently gave two further mortgages of different properties to the defendants.

In an action by the plaintiffs, as second mortgagees, to redeem R.:—

*Held*, that the defendants, as first mortgagees of R., were entitled to consolidate their prior mortgage on M. with their mortgage on R., but



**MORTGAGE—continued.**

not the two mortgages subsequent in date to the plaintiffs' mortgage.

*Hopkinson v. Rolt*, (1861) 9 H. L. C. 514, applied.

**HUGHES v. BRITANNIA PERMANENT BENEFIT BUILDING SOCIETY** — **Kekewich J. 607**

— Land transfer — Mortgage or charge —  
"Registered proprietor" — Fraud —  
Forged transfer — — — — **47**  
*See LAND TRANSFER.*

— Licensing Acts—Mortgagor and mortgagee  
—Trust deed—Leaseholds—Parties interested — — — — **98**  
*See LICENSING ACTS.*

— Partnership assets, Authority to mortgage—  
Death of partner—Priorities—Notice.  
*See PARTNERSHIP.* **427**

— Stock Exchange, Default on—Deposit of  
securities—Secured creditor—Costs.  
*See BANKRUPTCY.* **1. 444**

**MUNICIPAL CORPORATIONS.**

*See under CORPORATION.*

**MUSICAL COMPOSITION**—Registration—Agreement—Author and publisher—Assignment—Entry on register — — **595**  
*See COPYRIGHT.* **3.**

**NORTH EASTERN RAILWAY (HULL DOCKS)**

**ACT**—Powers—Ultra vires—Railway company—Dock company—Amalgamation—Water — — — — **675**  
*See COMPANY.* **10.**

**NOTICE**—Partner, Death of—Authority to mortgage partnership assets—Lien of deceased partner's executors—Priorities.  
*See PARTNERSHIP.* **427**

— Tramways—Protection of mains—Notice by promoters to owner of mains of intention to construct tramway—Limit of time for giving counter-notice **578**  
*See TRAMWAYS.*

**OPTION**—Lessor and lessee—Option to purchase reversion in fee—Interest in land—Perpetuity—Charity — — — **532**  
*See LESSOR AND LESSEE.*

**PARTICULARS** — Misrepresentation — Property described as freehold — — — **175**  
*See VENDOR AND PURCHASER.* **1.**

**PARTIES**—Land Transfer Act—Appeal from registrar—"Applicant"—Locus standi.  
*See LAND TRANSFER.* **47**

— Municipal corporation—Illegal borrowing—Overdraft at bankers' — — **106**  
*See CORPORATION.*

**PARTIES—continued.**

— Pleading—Lost grant—Date and parties.

*See PRACTICE.* **494**

**PARTNERSHIP**—Dissolution—Death of Partner—Business carried on by surviving Partner—Authority to mortgage Partnership Assets—Mortgage by deposit of Title Deeds of Partnership Real Estate—Lien of deceased Partner's Executors—Priorities—Notice—Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 39.

A surviving partner, for the purpose of winding up the partnership affairs, may continue the business and may mortgage the partnership property, whether real or personal, to secure a partnership debt.

The principle of *In re Langmead's Trusts*, (1855) 20 Beav. 20; affirmed on appeal, 7 D. M. & G. 353, applied to real estate.

A surviving partner carried on the business in the partnership name and continued the partnership banking account, which was overdrawn at the death of the deceased partner, and remained overdrawn until the final winding up of the business. After paying certain moneys into this account and drawing certain moneys out, he deposited with the bank the title deeds of certain partnership real estate to secure the overdraft:—

*Held*, that, in the absence of evidence to the contrary, the bank were entitled to assume that the dealings with the account were for the purpose of winding up the partnership, and that their mortgage was a valid security, and took priority over the lien of the deceased partner's executors on the surplus assets for his share in the partnership.

Decision of Farwell J., [1906] 1 Ch. 113, affirmed. *In re BOURNE. BOURNE v. BOURNE* **C. A. 427**

**PARTY WALL**—User of external wall as—Architect—Scope of authority — — **87**  
*See LANDLORD AND TENANT.* **1.**

**PATENT**—Discontinuance—Action for Infringement—Terms on which allowed—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), ss. 18, 19, 20—Patents, Designs, and Trade Marks Act, 1888 (51 & 52 Vict. c. 50), s. 5—Rules of the Supreme Court, 1883, Order XXVI, r. 1.

The plaintiff having brought an action for an injunction to restrain infringement of his letters patent for an invention, and the defendant having delivered his defence with particulars of objection, the plaintiff delivered his reply. Defendant then gave notice of an application for liberty to amend his particulars by stating certain alleged defects in the specification, but abandoned the application. The notice of application disclosed to the plaintiff something which assured him that he could not succeed in the action unless he corrected his patent, and with a view to doing this he applied for leave to discontinue the action:—

*Held*, that leave should only be given on the terms of the plaintiff not bringing any action against the defendant in respect of any infringement alleged in the present action, and paying the costs of that action, including the costs of the particulars of objection. **ROBERTSON v. PURDEY** — — — — **Buckley J. 615**



**PATENT**—*continued.*

2. — *Expired Patent—Action for Declaration of Invalidity—No consequential Relief—Discretion of Court—Practice—Rules of Supreme Court, 1883, Order xxv. r. 5—Mode of Procedure—Petition for Revocation—Fiat of Attorney-General—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), ss. 26, 32.*

An action claiming merely a declaration of invalidity of letters patent already expired, where no legal right of the plaintiff has been infringed, is not maintainable.

Decision of Joyce J., [1906] 1 Ch. 324, affirmed.

The proper mode of procedure in a case of this kind is by a petition for revocation under s. 26 of the Patents, Designs, and Trade Marks Act, 1883.

The mere fact that a patent has expired is not of itself a sufficient reason for refusing a fiat for a petition for revocation. *NORTH EASTERN MARINE ENGINEERING COMPANY v. LEEDS FORGE COMPANY* — — — **C. A. 498**

3. — *Infringement—Licence—Condition—Purchase of patented Article from Licensee without Notice of Condition—Estoppel—Purchaser's Liability to Action for Infringement.*

Appeal from a decision of Buckley J. (reported [1906] 1 Ch. 605) dismissed. *BADISCHE ANILIN UND SODA FABRIK v. ISLER* **C. A. 443**

**PAYMENTS**—Preferential—Administration of assets—Executor—Specialty debt **584**  
*See ADMINISTRATION. 1.*

— Solicitor's bill—Part payment—Retainer  
*See LIMITATIONS, STATUTE OF. 359*

**PERPETUITY**—Lessor and lessee—Option to purchase reversion in fee—Interest in land— — — — **532**  
*See LESSOR AND LESSEE.*

— Power—Appointment—Election — **288**  
*See SETTLEMENT.*

— Rule against perpetuities—Will—Remoteness—Special power of appointment—Exercise — — — — **199**  
*See WILL. 8.*

**PERSONALTY**—Power to charge limited sum on real estate—General gift of personality—Effect as to exercising power to charge realty — — — **459**  
*See WILL. 7.*

**PLAN**—Building scheme—Implied representation—Power to vary—Blocking up road— — — — **283**  
*See BUILDING SCHEME.*

**PLEADING**—Lost grant—Date and parties **494**  
*See PRACTICE.*

**POOR LAW**—*Guardian of the Poor—Disqualification for Office—"Composition or Arrangement with Creditors"—Administration Order—Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 46, sub-s. 1 (c)—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 122.*

Where a guardian of the poor obtains an

**POOR LAW**—*continued.*

administration order under s. 122 of the Bankruptcy Act, 1883, providing for the payment of less than 20s. in the pound in respect of his debts, he has made a "composition or arrangement with his creditors" within the meaning of s. 46 of the Local Government Act, 1894, and is disqualified for office.

Observations on *Lowe v. Lowrie*, (1902) 18 Times L. R. 553. *BRADFIELD v. CHELTENHAM GUARDIANS* — — — **Buckley J. 371**

**POSTPONEMENT**—Directors—Powers—Postponement of general meeting — **193**  
*See COMPANY. 7.*

**POWER**—Jointure—Power not yet in existence—Defective execution—Intention—Execution by the Court — — **523**  
*See JOINTURE.*

— Will—Power to charge limited sum on real estate—General gift of personality—Effect as to exercising power to charge realty — — — — **459**  
*See WILL. 7.*

**POWER OF APPOINTMENT**—*Special Power—Exercise by Will—Use of Word "appoint"—Indications of contrary Intention.*

By a settlement, made in 1863 on the marriage of W. and X., leasehold hereditaments were settled upon trust, after the decease of the survivor of them, for all and every the children and child of the marriage in such parts and shares as the survivor should by will or codicil appoint.

W. survived X., and by his will, after making bequests of a watch, a picture, and an organ, he gave, devised, bequeathed, and appointed all the residue of his "estate," "real as well as personal," unto trustees, upon trust to convert into money such parts of "the said trust premises" as should not consist of money, and out of the proceeds to pay his funeral expenses and debts, and to pay and divide the residue of "such trust moneys and premises unto and equally between" his sons A., P., and R. (declaring that he made no provision for his other children because they were sufficiently provided for). The testator then empowered his trustees to postpone the conversion of his "real and personal estate" for so long as they should think proper, and during the postponement to manage, lease, or let his "real and leasehold estates," and out of the capital or income thereof to make any proper outlay for improvements, repairs, insurance, or otherwise for the benefit of his "real or personal estate," but declared that no property not actually producing income which should form part of his estate should be treated as producing income. The testator also declared that the trustees might invest the "trust moneys representing the shares" of P. and R. during their respective minorities in certain specified securities, and that during their minorities the trustees should pay the whole income of those shares to A. as their guardian for their maintenance:—

*Held*, that the will did not operate as an

**POWER OF APPOINTMENT**—*continued.*

exercise of the special power given by the settlement.

*In re Cotton*, (1888) 40 Ch. D. 41, followed.

*In re Mayhew*, [1901] 1 Ch. 677, distinguished.

*In re Weston's Settlement*. *NEEVES v. WESTON* - - - - **Buckley J. 620**

— Perpetuity—Election - - - - **288**  
See SETTLEMENT.

— Remoteness—Special power of appointment — Exercise—Rule against perpetuities  
See WILL. 8. - - - - **199**

— Trustees—Compound settlement - - **502**  
See SETTLED LAND. 4.

**POWERS**—Directors—Postponement of general meeting - - - - **193**  
See COMPANY. 7.

— Ultra vires — Railway company — Dock company—Amalgamation - - **675**  
See COMPANY. 10.

**PRACTICE**—Pleading—Lost Grant—Date and Parties.

Under the modern practice, a lost grant may be pleaded without stating date or parties.

*Hendy v. Stephenson*, (1808) 10 East, 55, not followed. *PALMER v. GUADAGNI*

**Swinfen Eady J. 494**

— Patent.  
See under PATENT.

**PREFERENCE** — Fraudulent — Registered debenture issued pursuant to antecedent unregistered agreement - **467**  
See COMPANY. 16.

**PREFERENTIAL PAYMENTS** — Administration of assets—Executor—Specialty debt - - - - **584**  
See ADMINISTRATION. 1.

**PRESCRIPTION** — Light — Dominant and servient tenements held under common landlord - - - - **406**  
See LIGHT. 2.

**PRINCIPAL AND AGENT**—Numerous transactions — Dishonesty in some—Right to retain Commission—Sole Agent for Sale of Principal's Goods — Selling Goods of rival Traders — Accounts of Profits.

Where the transactions between a principal and his agent are severable, and in some of them the agent has been honest whilst in others he has been dishonest, he is entitled to his commission in all the instances in which he has been honest, but is not entitled to it in all the instances in which he has been dishonest.

*Andrews v. Ramsay & Co.*, [1903] 2 K. B. 635, discussed.

When an agent, bound to sell only his principal's goods, in breach of his duty sells the goods of his principal's competitors in trade, he must account to his principal for the profits he has made on all such sales. *NITEDALS TAEND-STIKFABRIK v. BRUSTER* - **Neville J. 671**

**PRIORITY** — Partner, Death of — Partnership assets—Authority to mortgage—Lien of deceased partner's executors—Notice - - - - **427**  
See PARTNERSHIP.

**PROBATE** — Death of annuitant before probate—Right to value of annuity  
See ANNUITY. **648**

**PROSPECTUS** — Directors' liability — Mis-statements—Omissions - - **129**  
See COMPANY. 12.

— Untrue statement—Evidence—Liability of estate of deceased director - **235**  
See COMPANY. 13.

**PUBLIC HEALTH**—Audited accounts—Borough treasurer—His duty and liability **106**  
See CORPORATION.

— Electric lighting—Erection of refuse destructor—Ultra vires — Injunction  
See ELECTRIC LIGHT. **257**

**PUBLISHER**—Author and—Copyright—Equitable assignment—Story not in existence — Complete copyright — Public documents - - - - **550**  
See COPYRIGHT. 1.

— Author and publisher—Musical composition — Registration — Agreement — Assignment—Entry on register - - **559**  
See COPYRIGHT. 3.

**PURCHASER**—Vendor and.  
See under VENDOR AND PURCHASER.

**RAILWAY**—Private Act—Statutory Obligations — Statutory Contract with Landowner — Subsequent Contract in Derogation of same — Public Rights — Ultra vires — Specific Performance — Damages.

In 1887 the private Act of a railway company contained provisions for the protection of B., a landowner, whereby the company was bound, unless otherwise agreed between the company and B., to construct and maintain a station at W., close to B.'s property; the station was in due course erected. In 1900 the company's undertaking was transferred to and became vested in the South Eastern Railway Company, who subsequently, in ignorance of the provisions of the Act of 1887, contracted for valuable consideration with the plaintiff to pull down the station at W. and erect another nearer to the plaintiff's property. In an action by the plaintiff for specific performance or damages:—

*Held* (Romer L.J. dissenting), that the contract with the plaintiff was ultra vires, as it was not competent to a railway company to take the land and then to do that which the statute prohibited, and it made no difference that the prohibition was not in the interest of the general public, but for the protection of a private owner, and that the action must be dismissed.

Decision of Farwell J., [1905] 2 Ch. 280,

**RAILWAY**—*continued.*

reversed. *CORBETT v. SOUTH EASTERN AND CHATHAM RAILWAY COMPANIES' MANAGING COMMITTEE* - - - - **C. A. 12**

— Dock company—Amalgamation—Powers—  
Ultra vires - - - - **675**  
*See COMPANY. 10.*

**RATES** — Covenant by landlord to pay rates —  
Underlease — Privy of contract —  
Underlessee not an "assign" - - **631**  
*See LANDLORD AND TENANT. 2.*

**REAL ESTATE**—General devise of real estate—  
No real estate — Intention — Extrinsic  
evidence—Admissibility - - **305**  
*See WILL. 4.*

— Power to charge limited sum on real estate  
— General gift of personalty—Effect as  
to exercising power to charge realty  
*See WILL. 7.* **459**

**RECITAL**—Title—Recital twenty years old **206**  
*See VENDOR AND PURCHASER. 2.*

**REDUCTION OF CAPITAL**—Paying off capital  
in excess of company's wants—Pro-  
cedure - - - - **394**  
*See COMPANY. 14.*

**REGISTRAR** — Land transfer—Appeal from  
registrar—Parties—Locus standi - **47**  
*See LAND TRANSFER.*

**REGISTRATION** — Company—Debentures—Ex-  
tension of time—Protection of unsecured  
creditors - - - - **627**  
*See COMPANY. 6.*

— Company—Debentures—Omission to regis-  
ter—Order for extension of time - **697**  
*See COMPANY. 5.*

— Company, Liability of—Preliminary ex-  
penses—Registration fees - - **435**  
*See COMPANY. 2.*

— Company—Winding-up—Fraudulent pre-  
ference—Registered debenture issued  
pursuant to antecedent unregistered  
agreement - - - - **467**  
*See COMPANY. 16.*

— Land Transfer Act.  
*See under LAND TRANSFER.*

— Musical composition—Agreement—Author  
and publisher—Assignment—Entry on  
register - - - - **595**  
*See COPYRIGHT. 3.*

**REMAINDERMAN**—Tenant for life and.  
*See under SETTLED ESTATE.*

**REMOTENESS**—Mine—Subsidence—Measure of  
damages—Risk of future subsidence  
*See MINE. 1.* **22**

— Option to purchase reversion in fee—  
Interest in land—Perpetuity - **532**  
*See LESSOR AND LESSEE.*

**REMOTENESS**—*continued.*

— Special power of appointment—Exercise—  
Rule against perpetuities - - **199**  
*See WILL. 8.*

**REPAIRS**—Lessor's covenant—Construction—  
Good and substantial repair—Natural  
decay - - - - **166**  
*See LANDLORD AND TENANT. 3.*

**RESERVOIR** — Mining lease—Compensation—  
Waterworks—Capital or income **138**  
*See SETTLED LAND. 2.*

— Waterworks — Right to support from  
minerals under adjacent land—Limit  
of forty yards - - - - **564**  
*See MINES. 2.*

**RESIDUE**—Ademption—Legacy to child—Resi-  
due to child and stranger—Advance-  
ment to child - - - - **230**  
*See WILL. 1.*

**RESOLUTION**—Directors—Powers—Resolution  
by a simple majority of shareholders for  
sale of undertaking—Refusal of directors  
*See COMPANY. 8.* **34**

**RETAINER**—Solicitor's bill—Part payment—  
Retainer on account with assent of  
client - - - - **359**  
*See LIMITATIONS, STATUTE OF.*

**REVENUE**—*Income Tax—Divorce—Separation  
Deed—Alimony—Annuity—Deduction of Income  
Tax—Income Tax Act, 1842 (5 & 6 Vict. c. 35),  
ss. 102, 103—Income Tax Act, 1853 (16 & 17  
Vict. c. 34), s. 40.*

A divorce suit was compromised by the  
parties agreeing upon a deed of separation,  
whereby it was referred to an arbitrator to  
determine the amount of the wife's alimony,  
and, the arbitrator having fixed the amount, the  
husband, by a supplemental deed, covenanted to  
pay the annual sum awarded by the arbitrator  
to trustees in trust for the wife:—

*Held*, that the annuity was payable less  
income tax.

Decision of Kekewich J., [1906] 1 Ch. 768,  
affirmed. *In re BARRY'S TRUSTS. BARRY v.  
SMART* - - - - **C. A. 358**

**REVOCATION**—Gift to testator's son and his  
children — Revocation by codicil of  
benefit to son—Effect on children's  
interests - - - - **121**  
*See WILL. 9.*

— Patent, Expired—Mode of procedure—Peti-  
tion for revocation—Fiat of Attorney-  
General - - - - **498**  
*See PATENT. 2.*

**RIGHT OF WAY.**

*See under WAY, RIGHT OF.*

**ROAD**—Block up—Cul-de-sac—Dedication to  
public—User - - - - **283**  
*See BUILDING SCHEME.*



**RULES OF SUPREME COURT:**—Order XVI.,  
rr. 48, 54—*Parties* - - - 235  
See COMPANY. 13.

— Order XXV., r. 5—*Proceedings in lieu of  
demurrer* - - - 498  
See PATENT. 2.

— Order XXVI., r. 1—*Discontinuance* - 615  
See PATENT. 1.

— Order LXV., rr. 8, 27, sub-r. 29; Appendix N,  
Nos. 59, 66—*Costs* - - - 487  
See COSTS.

**SATISFACTION**—After-acquired property clause  
—Persons derivatively entitled—Elec-  
tion - - - 222  
See WILL. 10.

**SCHOOL BOARD.**  
See under SCHOOLS.

**SCHOOLS**—School Board—United District—  
Severance—Adjustment of Property and Li-  
abilities—Education Act, 1902 (2 Edw. 7, c. 42),  
Sched. II., clauses 1, 22.

Where a united school district becomes  
severed under s. 1 of the Education Act, 1902,  
there is no automatic severance of property and  
liabilities according to areas under Sched. II.,  
clause 1, but an adjustment under clause 22 is  
required.

*Oldham Corporation v. Bank of England*,  
[1904] 2 Ch. 716, distinguished.

*In re WALLSEND BOROUGH COUNCIL AND  
NORTHUMBERLAND COUNTY COUNCIL*  
Swinfen Eady J. 506

**SECURED CREDITOR**—Default on Stock Ex-  
change—Mortgage—Deposit of securi-  
ties—Redemption—Notice of act of  
bankruptcy - - - 444  
See BANKRUPTCY. 1.

**SEPARATION DEED**—Income tax, deduction  
of—Divorce—Alimony—Annuity 358  
See REVENUE.

**SETTLED ESTATE**—Tenant for Life and  
Remainderman—Residuary Personalty—Testa-  
tor's Liabilities—Covenant to pay Life Annuities  
—Capital and Income—Apportionment.

A testator who had covenanted to pay life  
annuities bequeathed the proceeds of sale of his  
residuary real and personal estate upon successive  
trusts for a life tenant and remainderman:—

*Held*, that the successive instalments of the  
annuities must be borne by income and capital  
in proportion to the actuarial values of the life  
estate and reversion at the testator's death.

*Yates v. Yates*, (1860) 28 Beav. 637, followed.  
*In re Bacon*, (1893) 62 L. J. (Ch.) 445, not  
followed.

*In re DAWSON. ARATHOON v. DAWSON*  
Swinfen Eady J. 211

**SETTLED LAND**—Investment—Capital Money—  
Direction by Tenant for Life to invest—Improper  
Investment within Letter of Power—Control of  
Court—Settled Land Act, 1882 (45 & 46 Vict.  
c. 38), ss. 21, 22, sub-s. 2; s. 53.

A tenant for life under the Settled Land Act,

**SETTLED LAND**—continued.

1882, directed the trustees of the settlement to  
invest capital moneys in their hands in the  
purchase of certain leasehold houses. The  
trustees procured the report of an independent  
surveyor shewing that the proposed investment,  
though within the words of the power given by  
the Act, was undesirable, and they declined to  
proceed with the purchase. Farwell J. held  
(1.) that, assuming the direction was given bona  
fide, the trustees were not bound to act upon it;  
(2.) that it was not given bona fide.

Appeal from this decision on the question of  
facts dismissed.

Collins M.R. and Cozens-Hardy L.J. also  
expressed their concurrence with the observa-  
tions of the learned judge as to the law.

Decision of Farwell J., [1905] 2 Ch. 419,  
affirmed.

*In re HUNT'S SETTLED ESTATES. BULTEEL v.  
LAWDESHAYNE* - - - C. A. 11

2. — Mining Lease—Right to make up  
Shorts against future Royalties—Coal required  
for Support of Reservoir—Lessor's Compensation  
for Royalties—Capital or Income—Apportion-  
ment—Royalties covered by Shorts—Lessee's  
Rights—Waterworks Clauses Act, 1847 (10 & 11  
Vict. c. 17), ss. 6, 22, 25.

The life tenant of a settled estate was  
entitled to the whole rent and royalties reserved  
on mining leases. The working of certain coal  
was stopped by a water authority under s. 22 of  
the Waterworks Clauses Act, 1847, and the lessee  
was compensated under s. 25. The lessor's com-  
pensation for the acreage royalties that would  
have been received in the five years necessary to  
work the coal was assessed under s. 6, and paid  
into Court:—

*Held*, as between life tenant and remainder-  
man, that though the coal would probably have  
been worked out in the life tenant's life, he was  
not entitled to immediate payment of the com-  
pensation, but that it must be divided into half-  
yearly instalments in proportion to the coal that  
would actually have been worked in each half-  
year and paid or allocated accordingly.

*In re Robinson's Settlement Trusts*, [1891] 3  
Ch. 129, 133, followed.

*In re Barrington*, (1886) 33 Ch. D. 523, not  
followed.

*Held*, also, that as between lessor and lessee  
a right to make up shorts against future royalties  
to an amount considerably exceeding the lessor's  
compensation for the royalties in question did  
not entitle the lessee to immediate payment of  
the compensation, but that if he continued  
working under the lease he would become  
entitled to each instalment as it accrued. *In re  
FULLERTON'S WILL* - Swinfen Eady J. 138

3. — Tenant for Life—Capital Money—  
Improvements—Scheme—Approval of Trustees—  
Discretion—Settled Land Act, 1882 (45 & 46 Vict.  
c. 38), ss. 25, 26, 53.

Where under s. 26 of the Settled Land Act,  
1882, a tenant for life submits for approval to  
the trustees of the settlement a scheme for the  
execution of an improvement, the duty of the  
trustees is confined to seeing—(1.) that the



**SETTLED LAND**—*continued.*

improvement proposed is an improvement authorized by the Act, namely, that it is for the benefit of some land comprised in the settlement; (2.) that the scheme for the execution of the improvement is a proper one for carrying out the particular improvement; and (3.) that in submitting the scheme to the trustees the tenant for life is acting bona fide and on competent skilled advice. The trustees are not concerned with the general policy pursued by the tenant for life in improving the property, nor, in a case where there is capital money in hand, with the amount already spent on improvements. *In re* EARL OF EGMONT'S SETTLED ESTATES. *LEFROY v. EARL OF EGMONT*

Warrington J. 151

4. — *Trustees—Compound Settlement—Appointment—Settled Land Act, 1882* (45 & 46 Vict. c. 38), s. 2, sub-ss. 1, 8.

Limited owners with joint absolute dominion over the estates comprised in a strict settlement (e.g., the life tenant and tenant in tail male in immediate remainder of estates unfettered by any charges or powers of charging) can resetttle the estates as they please, and if they choose to keep the original settlement alive by a sufficient partial restoration of the subsisting uses, trusts and powers, they can appoint Settled Land Act trustees of the compound settlement constituted by the settlement and resettlement.

*In re Spencer's Settled Estates*, [1903] 1 Ch. 75, distinguished. *In re SPEARMAN SETTLED ESTATES* — — — Swinfen Eady J. 502

**SETTLEMENT** — *Power — Appointment — Perpetuity—Election.*

Under two settlements made in 1871, and another made in 1882, W. had testamentary powers of appointment over the settled funds amongst her issue, her children taking in default of appointment. She had also unsettled property of her own. All the children were born after 1871 and before 1882.

By her will W. gave both the settled and the unsettled properties to trustees upon trusts in favour of her son and her three daughters, part of the son's share being payable to him at the age of twenty-five years, and the share of each daughter being given in trust for her for life with remainder to her children:—

*Held*, that as the gifts to the son at twenty-five and to the grandchildren were, in respect of the property settled in 1871, void as infringing the rule against perpetuities, the children of W. were not bound to elect between what was invalidly appointed to them and the interests validly given to them by the will.

*In re Oliver's Settlement*, [1905] 1 Ch. 191; and *In re Beales' Settlement*, [1905] 1 Ch. 256, followed.

*In re Bradshaw*, [1902] 1 Ch. 436, not followed. *In re* WRIGHT. *WHITWORTH v. WRIGHT* — — — Buckley J. 288

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Mains—Limit of Time for giving Counter-notice  
—*Tramways Act, 1870 (33 & 34 Vict. c. 78),*  
*s. 30, sub-s. 1.*

By s. 30, sub-s. 1, of the Tramways Act,  
1870, the promoters are empowered for the  
purpose of making any tramway to alter the position  
of any gas or water mains, but they must first  
give seven day's notice to the company or person  
to whom the mains may belong of their intention  
to lay down the tramway, and the notice must  
be accompanied by a plan of the proposed work,  
and "if it should appear to any such company  
or person that the construction of the tramway  
as proposed would endanger any such mains,  
such company or person may give notice to the  
promoters to lower or otherwise alter the position  
of the said mains" so far as necessary :—

*Held*, that the counter-notice to be given by  
the owner of the mains might be given at any  
time until the tramway was constructed.  
**HASTINGS TRAMWAYS COMPANY v. HASTINGS**  
**AND ST. LEONARDS GAS COMPANY C. A. 578**

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*Vict. c. 83)*—*Trustee Act, 1893 (56 & 57 Vict.*  
*c. 53), s. 1 (g) ; s. 5, sub-s. 3 ; s. 50.*

The general statutory power of a trustee to  
invest in the debenture stock of a certain class  
of railways under s. 1 (*g*) of the Trustee Act,

**TRUSTEE**—*continued.*

1893, is not enlarged by s. 5, sub-s. 3, so as to enable him to invest in nominal debentures issued under the Local Loans Act, 1875, as the latter sub-section is impliedly confined to the enlargement of express powers of investment.

*In re TATTERSALL. TOPHAM v. ARMITAGE*  
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**VENDOR AND PURCHASER**—*Particulars—Misrepresentation—Sale by Auction—Property described as Freehold—Conditions of Sale—Title—Purchaser required to assume Facts—Long Term—Enlargement into Fee Simple—Presumption of Release of Rent—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c.41), s. 65.*

The vendor put up for sale by auction property described as “an eligible freehold investment comprising a house and shop No. 249, Whitechapel Road.” One of the conditions of sale was “The property was formerly held with other property under an indenture of lease dated January 31, 1672, for a term of 500 years at a yearly rent of 1s., but the property was assigned in the year 1828 free from the said rent, which has never been paid by the vendor, and the purchaser shall assume that the said rent has been released and is not now charged upon the property sold. By a deed poll in 1902 under the provisions of the Conveyancing Act, 1881, the

**VENDOR AND PURCHASER**—*continued.*

property was expressed to be enlarged by the beneficial owner into a fee simple. . . . It shall be assumed that the said deed poll operated as an effectual enlargement according to its tenor.”

The lease was from the lord of the manor of Stepney. The facts stated in the condition were true, and the property had been assigned to the vendor in 1902 as free from the rent but subject to the lease, but in the abstracted deeds between 1828 and 1902 it was described as held at a rent of 1s. The purchaser objected that the assumption he was required to make in the particulars was to the vendor's knowledge untrue and the statement in the particulars that the property was freehold was a misrepresentation, and brought this action for rescission of the contract and return of his deposit. It was proved at the hearing that a search in the records of the manor shewed that no rent had been paid for fifty years, and there was no certain evidence that it had ever been paid at all :—

*Held*, that the vendor might reasonably believe that the property was freehold and was therefore justified in so describing it in the particulars, and then, by the conditions, requiring the purchaser to assume the facts establishing the freehold title, which the vendor knew he would have a difficulty in proving. There was therefore no misrepresentation.

*Torrance v. Bolton*, (1872) L. R. 14 Eq. 124 ; 8 Ch. 118, distinguished. **BLATBERG v. KEEVES**  
**Warrington J. 175**

**2. — Title—Recital Twenty Years old—Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), ss. 1, 2.**

A vendor's title to a freehold house comprised the following deeds :—

1. A conveyance on sale in August, 1877.
2. A first mortgage in May, 1878.
3. A second mortgage in June, 1878.
4. A release of the second mortgage in May, 1882.

5. A conveyance on sale of the house in June, 1882, by the mortgagor and first mortgagee to the vendor's immediate predecessor in title with an acknowledgment of the right to production of the prior deeds which included other property.

This conveyance recited that by the first mortgage the house and other property were “granted unto and to the use of the mortgagee his heirs and assigns” by way of mortgage “as therein mentioned.”

The vendor having sold by open contract in 1906, relied on this recital and declined to furnish any title prior to the conveyance of June, 1882.

The purchaser, while insisting on her right to a forty years' title, offered to begin with the conveyance of August, 1877 :—

*Held*, that the purchaser was entitled to a title beginning with the conveyance of August, 1877.

*Bolton v. London School Board*, (1878) 7 Ch. D. 766, distinguished and disapproved. *In re* **WALLIS AND GROUT'S CONTRACT**

**Swinfen Eady J. 206**



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**3. — Title Deeds, Custody of—Sale of Land—Retention of Part of Estate by Vendor—Extinguished Easement—Retention of Servient Tenement—Deeds shewing Title to Easement and to Extinguishment—Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, r. 5.**

Documents of title shewing the title to, and the extinguishment of, an easement formerly appurtenant to the land sold, over a servient tenement retained by the vendor, relate to the servient tenement, and the vendor has a right to retain them under s. 2 of the Vendor and Purchaser Act, 1874. *In re LEHMANN AND WALKER'S CONTRACT* — **Swinfen Eady J. 640**

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See MINES. 2.

**WAY, RIGHT OF**—Cul-de-sac—Dedication to public—User—Blocking up road — **283**  
See BUILDING SCHEME.

**WILL**—Ademption—Legacy to Child—Residue to Child and Stranger—Advancement to Child.

A testator bequeathed a legacy to an adopted child to whom he stood in loco parentis and divided his residue between that child and a stranger. He made a subsequent advance to the child:—

*Held*, that even if the advance had been a portion, which on the evidence was not the case, the doctrine of ademption by subsequent portion would not have been applied in favour of a stranger against a child taking a share of residue as well as a legacy, and that neither the legacy nor the share of residue would have been adeemed.

*Montefiore v. Guedalla*, (1859) 1 D. F. & J. 93, 100; *Meinertzen v. Walters*, (1872) L. R. 7 Ch. 670; and *Fowkes v. Pascoe*, (1875) L. R. 10 Ch. 343, 351 applied.

*In re HEATHER*, *PUMFREY v. FRYER* — **Swinfen Eady J. 230**

**WILL—continued.**

**2. — Bequest—"Money invested in" Lambeth Waterworks Company—Metropolis Water Act, 1902 (2 Edw. 7, c. 41)—Transfer of Undertaking to Water Board—Compensation—Metropolitan Water Stock—Ademption—Will—Construction—Wills Act, 1837 (1 Vict. c. 26), s. 24.**

A testator bequeathed "the interest arising from money invested in" (inter alia) the "Lambeth Waterworks Company" to a legatee for life and then over. Between the dates of his will and death the undertaking of the Lambeth Waterworks Company was acquired by the Water Board under the provisions of the Metropolitan Water Act, 1902, and a sum of Metropolitan Water B stock had been issued to the testator as compensation in respect of the ordinary stock which at the date of his will he held in the Lambeth Waterworks Company:—

*Held*, that the Metropolitan Water B stock did not pass under the bequest.

The application of s. 24 of the Wills Act to specific bequests, discussed.

*Goodlad v. Burnett*, (1855) 1 K. & J. 341, applied. *In re SLATER. SLATER v. SLATER* **Joyce J. 480**

**3. — Class—Gift to Children as a Class—Children of deceased Child—Substitutional or Substantive Gift—Issue of Parent dead at Date of Will—"Shall die"—Words of Futurity—Construction of Will.**

A testator gave legacies to the children of A., one of his sons, referring to him as "my deceased son"; he gave a legacy and annuity to another son R., as to whose whereabouts he was ignorant; he then gave the residue of his estate "in trust for all or any my children or child (other than the said R.) who shall be living at my death" and attain twenty-one or marry, "provided that in case any one or more of my children or child (other than the said R.) shall predecease me, leaving any child or children living at my death, then such child or children of my deceased child (other than the said R.) shall take" the share which his or their "parent would have taken if such parent were living at my decease":—

*Held* (reversing the decision of *Joyce J.*, [1906] 1 Ch. 319, and dissentiente *Romer L.J.*), that the children of the son A. were entitled to share in the residue though A. was dead at the date of the will.

*Loring v. Thomas*, (1861) 1 Dr. & Sm. 497, discussed; and held, *per Vaughan Williams L.J.*, that the principle of that decision applied, and *per Romer* and *Fletcher Moulton L.JJ.*, that it did not. *In re GORRINGE. GORRINGE v. GORRINGE* — — — — — **C.A. 341**

**4. — General Devise of Real Estate—No Real Estate—Testatrix entitled to Proceeds of Sale of Realty subject to Trust for Sale—Intention—Extrinsic Evidence—Admissibility—Construction of Will.**

A testatrix devised all her real estate to trustees upon trust to pay the net rents and profits (subject to the payment thereof of a life annuity of 200*l.* to her husband) to her sister during her life, and after the sister's death upon

**WILL—continued.**

trust as to the said real estate and the income thereof for the sister's children, and the testatrix conferred upon her trustees power to demise and other powers incident to the management of real estate. The testatrix was not beneficially entitled to any real estate either at the date of her will or at her death, but at both those dates she was entitled, subject to certain subsisting annuities, to a moiety of the income and capital of the proceeds of sale of certain freehold property devised by her father's will upon trust for sale and vested in her as trustee of his will. There had been no election by the beneficiaries to take the freehold property unconverted :—

*Held*, that the devise in the testatrix's will passed all the beneficiary interest to which she was entitled in the real estate held upon trust for sale under her father's will.

The admissibility of extrinsic evidence in aid of the interpretation of wills, discussed.

*In re GLASSINGTON. GLASSINGTON v. FOLLETT* — — — — — **Joyce J. 305**

**5. — Gift "in addition to" previous Gift — Intention to make up stated Sum — Miscalculation — Construction of Will.**

Testator, after appointing executors and giving various specific and pecuniary legacies, disposed of his residue. By a first codicil he gave a legacy of 1000*l.* to be equally divided between certain of his godchildren therein described. By a subsequent codicil he gave "50*l.* additional to each of my godchildren as named in my will so that each receives 100*l.* each." On the death of the testator there were nine godchildren answering the description in the first codicil, and they received their shares of the legacy of 1000*l.*, amounting to more than 100*l.* each :—

*Held*, that the bequest in the subsequent codicil was a clear gift of 50*l.* additional to each of the godchildren followed by words of doubtful import, which could not be construed so as to cut it down, and consequently that the additional legacies were payable. *In re SEGELCKE. ZIEGLER v. NICOL* — — — — — **Joyce J. 301**

**6. — Illegitimate, Testator — Bequest to "all my Nephews and Nieces"—Some named—Some "Brothers and Sisters" named—Children of unnamed natural Sister — Construction of Will.**

A testator whose parents were never married had lived with them and his natural brothers and sisters as one family and treated them as his lawful relatives.

In his will he referred by name to all living natural brothers and sisters as his brothers and sisters and to some of their children as his nephews and nieces, but he did not mention a deceased natural sister or her children, and there was no evidence that he knew of the existence of those children. He made a bequest to "all my nephews and nieces" living at a certain period.

*Held*, that the children of the deceased natural sister were entitled to share in this bequest.

**WILL—continued.**

*In re Jodrell*, (1890) 44 Ch. D. 590; [1891] A. C. 304, 309, applied.

*Meredith v. Farr*, (1843) 2 Y. & C. Ch. 525, distinguished. *In re CORSELLIS. FREEBOEN v. NAPPER* — — — — — **Swinfen Eady J. 316**

**7. — Power to charge limited Sum on Real Estate—General Gift of Personality—Effect as to exercising Power to charge Realty—Wills Act, 1837 (1 Vict. c. 26), s. 27.**

Sect. 27 of the Wills Act presupposes the existence of some realty or personality, as the case may be, which is subject to a general power of appointment, and at the testator's uncontrolled disposition although not his property; and the section does not extend to the imposition of an otherwise non-existent charge, upon the property of another person, which if and when created would be personal estate which the testator would have power to appoint by a general bequest.

The reasoning of Fitzgibbon L.J. in *In re Wallinger's Estate*, [1898] 1 I. R. 139, adopted and followed.

Where, therefore, testator had under a settlement power by deed or will to charge real estate, of which he was only tenant for life, with payment to himself or any other person or persons of any sum or sums not exceeding in the whole 6000*l.*, with interest at a rate not exceeding 5 per cent., and to appoint the premises charged to any person for any term of years upon trusts for raising the sums charged, and by his will he gave all his real property to one person and all his personal property (except some pecuniary legacies) to the children of his sisters :—

*Held*, that the gift of personality did not operate as a charge, in favour of the donees, on the real estate which he had power to charge.

*In re Jones*, (1886) 34 Ch. D. 65, distinguished.

*In re SALVIN. MARSHALL v. WOLSELEY.*  
**Buckley J. 459**

**8. — Remoteness—Special Power of Appointment—Exercise—Rule against Perpetuities.**

A testator gave his residuary estate upon trust for his wife for life, and after her decease upon trusts for the benefit of his brother C. T. and his present and future issue as his said wife should appoint. The wife appointed the property in trust for C. T. for life, and after his death for all his children who had attained or should attain the age of twenty-five years if born in her lifetime, or twenty-one years if born after her decease. C. T. had nine children only, all of whom were born in the lifetime of the original testator, and all of whom had attained twenty-five before the death of the appointor :—

*Held*, that upon the appointment taking effect it was certain that, within the limits of perpetuity, not only would the persons to take be ascertained, but their interests would be vested, and the amount of their shares fixed; and, consequently, that the appointment was valid.

*Von Brockdorff v. Malcolm*, (1885) 30 Ch. D. 171, approved. *In re THOMPSON. THOMPSON v. THOMPSON* — — — — — **Joyce J. 199**

**WILL—continued.****9. — Revocation—Gifts to Testator's Son and his Children—Revocation by Codicil of Benefit to Son—Effect on Children's Interests.**

Testator by his will gave his business to trustees upon trust to carry it on for the benefit of his four sons, including G., until the youngest attained twenty-one, with power to employ any of them, for reward, as manager or otherwise, and subject as aforesaid in trust for the sons equally when the youngest attained twenty-one, and he declared that if, on the determination of the trusts as to the business, any son should be dead or unwilling to carry it on, any of the other sons were to be entitled to purchase his share.

By paragraph 6 of the will the trustees and the sons, while respectively carrying on the business, were to be entitled to use the property on which it was carried on for that purpose at a specified rent; and G. was to be entitled to occupy a house, 133, W. Road, at a fixed rent. These rents were payable to the testator's widow for life, and after her death to two of his daughters during spinsterhood. Subject as aforesaid, both properties were devised to the trustees to be held upon trust as to one fourth share for G. for life, and after his death for his children in fee simple.

By a codicil reciting that testator had reasons for dissatisfaction with G., that he had ceased to employ him in his business, and that G. had at testator's desire ceased to occupy 133, W. Road, testator revoked the trust for permitting G. to occupy that house, and proceeded to revoke "each and every devise, bequest, gift and legacy contained in my said will to or for the benefit of my same son," and to revoke and annul "every provision and benefit thereby given made or intended to or for him," and to direct that "every clause of my said will purporting to entitle him to share any part or parts of my estate, or of the proceeds, income or profits thereof with any other person or persons shall be construed, and the directions and trusts thereof shall be carried out, as if the name of my said son G. had never appeared therein." Testator also by the codicil directed that G. should not be appointed manager of or employed in the business, and left a legacy of 500*l.* in trust for the children of G. at twenty-one or marriage, and for their maintenance in the meantime, but directed that the trustees should not pay any income of the legacy to G. pursuant to s. 43 of the Conveyancing and Law of Property Act, 1881:—

*Held*, that the revocation extended only to the benefits given by the will to G.; that the interests thereby given to G.'s children were not revoked; but that the children's interests were accelerated, and that the children were in addition entitled to the legacy of 500*l.*

*Green v. Tribe*, (1878) 27 W. R. 39, and *Alt v. Gregory*, (1856) 8 D. M. & G. 221, followed.

*Tabor v. Prentice*, (1884) 32 W. R. 872, distinguished. *In re WHITEHORNE*. *WHITEHORNE v. BEST* — — — **Buckley J. 121**

**10. — Satisfaction—Daughter's Settlement—Father's Covenant—Absolute Bequest to****WILL—continued.****Daughter—After-acquired Property Clause—Persons derivatively entitled—Election.**

By a marriage settlement of 1898 a sum of 10,000*l.* (which included a sum of 5539*l.* secured to the trustees by the covenant of the wife's father) was settled on certain trusts for the wife, husband and children, the wife taking the first life interest, and covenanting to settle after-acquired property, to which she became entitled during the coverture, on substantially the same trusts.

By his will of 1905 the father gave one-third of his residuary real and personal estate to the wife for her separate use absolutely. The father died during the coverture. His clear residuary estate, subject only to the covenant, was 80,000*l.*, all personality:—

*Held*, that the bequest was a satisfaction as to the wife's life interest in the 5539*l.* secured by the covenant, but not as to the interests of other cestuis que trust not mentioned in the will, taking no direct interest in the bequest, and only in fact taking derivatively under the after-acquired property clause, because the bequest happened to take effect during the coverture. The wife was therefore the only person put to election.

*Lord Chichester v. Coventry*, (1867) L. R. 2 H. L. 71, 92, 95, applied. *In re BLUNDELL*. *BLUNDELL v. BLUNDELL*

**Swinfen Eady J. 222**

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**WORDS**—*continued.*

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|-------------------------------|-----|
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**WORDS**—*continued.*

|                                  |     |
|----------------------------------|-----|
| — "Nephews and nieces" - - - -   | 316 |
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